(21,237.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 441.

WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

COMMERCIAL MILLING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

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1 Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
COMMERCIAL MILLING COMPANY, Defendant in Error.

Return to Writ of Error to the Supreme Court of the State of Michigan.

STATE OF MICHIGAN:

Supreme Court.

No. 21,675.

COMMERCIAL MILLING CO., Plaintiff and Appellee,
vs.
WESTERN UNION TELEGRAPH CO., Defendant and Appellant.

Error to Wayne.

RECORD.

Amended Declaration.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

STATE OF MICHIGAN,
County of Wayne, ss:

And now comes the Commercial Milling Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, by Wilkinson & Younglove, its attorneys, and complains of the Western Union Telegraph Company, a corporation organized and existing under and by virtue of the laws of the
2 State of New York, in a plea of trespass on the case upon promises, filing this amended declaration in a suit heretofore commenced by writ of summons, and thereupon plaintiff says:

For that, Whereas, heretofore, to-wit, and prior to the fifteenth day of August, A. D. 1904, and on said day and since said time, the said defendant was and is the owner and operator of a system of electric telegraph, by means of which it undertakes and does agree, for a certain toll charged therefor, to transmit and deliver messages from one city of the United States to others, and has established and maintains offices for the receipt of messages so to be transmitted, and from which messages may be delivered which have been received from other points; that among the lines of telegraphic communica-

tion established by it is a line running from Detroit to Kansas City, and that among the offices maintained in the City of Detroit, for receipt of telegrams, was an office on the third floor of the Chamber of Commerce building, so-called, adjoining and in connection with the hall used for the Detroit Board of Trade, from which office said defendant undertook to receive and agreed to transmit such messages as might be given them to such places as said messages were directed for members of the Board of Trade, rendering a monthly account to each firm or corporation using said office for such messages as said firms or corporations might have sent during said month.

And, Whereas, On said fifteenth day of August, A. D. 1904, and prior thereto, the said plaintiff was and still is engaged in the business of manufacturing flour and feed in the City of Detroit, and for that purpose is forced to and does buy a large amount of wheat and other grain for use in its said mill.

3 And, Whereas, The said defendant contracted and agreed to transmit to the destination and to deliver any message or messages entrusted to its care to the person, firm or corporation to whom said message or messages were addressed, and to that end agreed to employ careful and competent operators for the transmission of said messages.

And, Whereas, On said fifteenth day of August, A. D. 1904, the plaintiff had been offered ten thousand bushels of No. 2 hard wheat at $1.01 a bushel for immediate acceptance, and in response thereto plaintiff wrote out the following message:

AUGUST 15TH, 1904.

To Kaw Grain & Elevator Co., Kansas City, Mo.

Accept your offer two hard dollar one ten thousand here.
(Sgd.) COMMERCIAL MILLING CO.,

and handed the same to the operator in charge of said office, who accepted the same for transmission to the Kaw Grain & Elevator Co., Kansas City, Mo., and agreed for a consideration to transmit the same.

Yet the said defendant, well knowing its duty in the premises, wantonly and negligently failed to carry out its said agreement, and to transmit said message or to send the same from Detroit, whereby, in consequence of the rise in the price of No. 2 hard wheat, the said plaintiff suffered loss and damage to the amount of two thousand ($2,000.00) dollars, which was the additional amount it was forced to pay for ten thousand bushels of No. 2 hard.

And for a second count, plaintiff says:

For that, whereas, heretofore, to-wit, on the fifteenth day of August, and prior thereto, the said defendant was and still is the owner of a system of electric telegraph, as more fully described and set forth in the first count of this declaration.

4 And, Whereas, On the said fifteenth day of August, A. D. 1904, and prior thereto, the said plaintiff was and still is engaged in the manufacture of flour and feed in the City of Detroit, in which place it owns and operates a flour mill for the

manufacture of said flour, for which business it requires and uses a large amount of wheat.

And, Whereas, On the day and year last aforesaid, it tendered to the operator in charge of the branch office of said defendant company a message in writing, as set forth in the first count hereof, accepting an offer to purchase certain wheat, as in said count alleged, which message was duly accepted by said defendant company, who agreed to transmit the same to the Kaw Grain & Elevator Company, at Kansas City, Mo.

And, Whereas, It became and was the duty of the said defendant to transmit said message to Kansas City and there to deliver it to the Kaw Grain & Elevator Company, as it had agreed to do.

Yet the said defendant, well knowing its duty in the premises, wantonly and negligently failed to carry out said agreement to transmit said message to the Kaw Grain & Elevator Company, whereby the said plaintiff suffered great loss and damage in being forced to buy said ten thousand bushels of No. 2 hard at an advance price of ten cents per bushel, all of which is to its damage two thousand dollars.

And for a third count, plaintiff says:

For that, Whereas, Heretofore, to-wit, on the fifteenth day of August, A. D. 1904, and prior thereto, said defendant was and still is the owner and operator of a line of electric telegraph, more fully described in the first count thereof.

And, Whereas, The said plaintiff was the owner and operator of a flour mill, requiring the use of a great amount of wheat and other grains, as more fully set forth in the first and second counts hereof.

5 And, Whereas, On said fifteenth day of August, A. D. 1904, the said plaintiff presented to the said defendant company, at its branch office in the Chamber of Commerce building, in the City of Detroit, the message set forth in the first count hereof, to be transmitted and delivered to the Kaw Grain & Elevator Company, at Kansas City, Mo., which said message the said defendant company, through its agents and employés, duly accepted and agreed to transmit and deliver.

And, Whereas, It thereupon became and was the duty of said defendant company, having accepted and agreed to deliver same message, to use proper care and diligence in the transmission of the same, and to see that said message was duly received by the operator at Kansas City, and was delivered from their office at Kansas City to the Kaw Grain & Elevator Company.

Yet, the said defendant, well knowing its duty in the premises, did wantonly and negligently refuse and neglect to carry out its said contract, and to that end to use proper care and diligence in the transmission of the said message, and did not ascertain that the same was received by its operator at Kansas City, and did not deliver the same to the Kaw Grain & Elevator Company, and was guilty of gross negligence in the discharge of its duty in carrying out its said agreement, by reason whereof the said plaintiff suffered great loss by reason of the advance in wheat by the time that he knew of the

failure of the defendant company to deliver said message, as more fully set forth in the first and second counts thereof, to his damage—two thousand ($2,000.) dollars.

And thereupon plaintiff brings suit.

WILKINSON & YOUNGLOVE,
Attorneys for Plaintiff.

6 *Plea.*

Defendant pleads the general issue.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

COMMERCIAL MILLING COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

Bill of Exceptions.

This case came on for trial before Hon. Geo. S. Hosmer, Circuit Judge, and a jury on the 13th day of December, 1905, whereupon the following proceedings were had:

ROBERT HENKEL, a witness produced and sworn on behalf of the plaintiff, testified as follows:

I am president of the Commercial Milling Company, grinding flour and selling flour. Have been in the flour business since about 1882 or 1883. In carrying on our business we are obliged to buy large quantities of wheat. The capacity of our mill is about one thousand barrels of flour a day. We buy wheat in Chicago, Kansas City, St. Louis and all over, wherever we can buy it to the best advantage. In August, 1904, we were having dealings with the Kaw Grain & Elevator Company. We had bought of them previously.

In regard to prices quoted, they always quoted delivered in Detroit. There was about ten cents a bushel difference between Detroit and Kansas City prices, the difference being freight rates and elevator charges.

7 Exhibit 2 is a telegram which I received from the Kaw Grain & Elevator Company of Kansas City, reading as follows:

EXHIBIT 2.

AUG. 15, 1904.

"Commercial Milling Co., Detroit, Mich.

Offer ten thousand 2 hard dollar one if quick that is what Chicago is paying us.

KAW GRAIN & ELEVATOR CO."

That means they offer 10,000 bushels of No. 2 hard wheat at $1.01 per bushel. 2 hard is a particular grade of wheat. The word

"quick" means no more than it means in the ordinary acceptation of the word—quick.

Exhibit 1 is a telegram written by myself addressed to the Kaw Grain and Elevator Company, Kansas City, Mo.

Mr. WILKINSON: I offer Exhibits 1 and 2 in evidence (reading from Exhibit 1).

EXHIBIT 1.

AUG. 15, 1904.

"Kaw Grain & Elevator Co., Kansas City, Mo.

Accept your two hard dollar one ten thousand here.

COMMERCIAL MILLING CO."

Telegrams marked with different marks and filed 12:56 p. m.

Mr. JOSLYN: There is a whole lot of other stuff you haven't read. Now, I want the whole telegram read from beginning to end.

COURT: (reading) Send the following message without repeating subject to the terms and conditions printed on the back hereof which are hereby agreed to.

8 Mr. JOSLYN: Yes, and then we will consider the terms and conditions on the back here.

Mr. WILKINSON: We offer in evidence Exhibit 1 so far as the face of the telegram appears. We claim the part on the back is void.

Mr. JOSLYN: I insist on the whole or none. You have made a contract there and I want to see whether that contract is good for anything now. I insist that, if he puts in his contract, he has got to put it in in its entirety. (The whole of the telegram was thereupon admitted in evidence and is hereto attached and marked Exhibit "1.")

Mr. JOSLYN: I now move to strike out all the testimony which has been given up to the present time on the ground that, under the claim of the contract, he is not entitled to recover except fifty cents. I believe we agreed as to the amount.

COURT: I think you better put the evidence in and make your motion at the conclusion of the case. I will give you an exception now and let the evidence go in.

Mr. JOSLYN: Very well; note an exception.

(Witness continues.) Within an hour anyway, perhaps half an hour, after receiving Exhibit 2, I wrote Exhibit 1. It is filed 12:56 p. m. That is the time the Western Union filed it. That is the original written by me. The telegram was written on the blank of the Postal Telegraph Company, but was delivered to the Western Union, as they accept anything on either side. I passed the telegram in to the Western Union Window, to an operator by the name of Andy. I gave it to him because he rather solicits business and I like to give him some occasionally. I could not tell whether the man's name is Cox or not. He has been there for years. I think he is there now.

This telegram is marked charged as the Company presented us with a monthly bill for telegrams.

9 After writing and sending this telegram I made a memorandum of having made the purchase and, when I got out to the office I dictated a letter confirming all the business I had done with the Kaw Grain & Elevator Company that day. Exhibit 3 is a copy of that letter. (Exhibit 3 read in evidence.)

I think I left for Cleveland that same night. I didn't hear anything further in reference to this matter until I returned home the Friday morning following, when I found a telegram there from the Kaw Grain & Elevator Company. Exhibit 4 is that telegram. It reads as follows:

EXHIBIT 4.

"KANSAS CITY, MO., *August* 17.

Commercial Milling Co., Detroit, Mich.

Pertinent. Have received no wire accepting offer ten thousand 2 hard.

KAW GRAIN & ELEVATOR CO."

"Pertinent" means "We have your letter of the 15th"—have received no wire accepting ten thousand 2 hard. This was called to my attention when I returned. (Exhibit 4 offered in evidence.) I returned home on Friday the 19th.

Q. Are you familiar with the price of grain of the same kind and quality as to be supplied in the telegram of those dates?

A. The same quality of grain on Saturday was about ten cents a bushel higher, the market had been advancing very rapidly.

Mr. JOSLYN: I object to that, and move to strike out the question and answer as irrelevant and immaterial, especially at this time.

COURT: Let it stand and note an exception.

10 I bought wheat in other markets to make up the deficiency at the market price, which was ten cents a bushel higher.

Mr. JOSLYN: I move to strike out the testimony of the plaintiff as it now stands on the ground that it is not material and does not tend to show any damages.

The COURT: Well, let it stand for the time being, anyway.

Cross-examination:

Exhibit 1 was written by me personally. We were at that time doing business with the Western Union and settling accounts monthly. The mill had been doing business in that way ever since we had been established, and ever since we have been doing any business practically. It was established in 1855, before my time, and from that time down to the writing of this telegram we had been doing business, or our predecessors had been doing business, with the Western Union in that manner.

In regard to using the Postal blank instead of a Western Union blank, we usually take any blank that is handy. I may have found

that blank in front of the Western Union window, I don't know. I simply pick up a telegraph blank; we do business pretty quick on the Board of Trade; and I write out a telegram and usually this man I call Andy, who has been with the Western Union for many years, is at the window and, when he is at the window, I throw in the telegram and say, "Here, Andy, let her go." Occasionally I have done business with the Postal Telegraph Company also, and I understood their methods as well as those of the Western Union. I had no ulterior object or purpose in view in selecting this Postal telegraph blank, only it happened to be within my reach. I was not thinking anything about the particular blank, whether
11 it was the Postal or Western Union, it was a telegraph blank. I knew they were substantially alike.

August 17 was on a Wednesday. When the telegram, Exhibit 4, was received from the Kaw Grain & Elevator Co. I was not in Detroit.

I am the president of the Commercial Milling Co. at the present time. Mr. F. G. Emmons is secretary and treasurer, but at that time Mr. Peter Henkel (my father) was president of the corporation and I was secretary and treasurer. There were no other officers of the corporation. The board of directors was composed of Peter Henkel and myself and Mrs. Julia Henkel, my mother. When I was away, Mr. Emmons, who was then the bookkeeper, had general charge of the affairs of the concern. He is still there.

When I got home on the morning of the 19th, I found this telegram. I don't believe I wired in reply, I simply wrote them and told them I was surprised and that there must be some mistake about it. I didn't reply by wire that I remember of. I had received other telegrams from the Elevator Company on that day and had replied to those. They were relative to the purchase of other grain, some 30,000 bushels. Exhibit 17 is part of that telegraphic correspondence. It was sent by the Commercial Milling Co.

I know about freight rates, as I paid freight generally, *i. e.*, it is usually deducted from the invoice, and we have to verify the rates when we get the bills of lading and so on. The freight is deducted from the invoice sent by the seller. It is a longer haul from Kansas City to Detroit than from Kansas City to Chicago, and it would cost more to haul to Detroit. I purchased 10,000 bushels of wheat to replace the 10,000 I didn't get from Kansas City on the 20th from the Hintz & Lint Company, at Kansas City. That was on Saturday.

12 Redirect examination.

I returned from Cleveland on the morning of the 20th, not the 19th, as I stated before, and ordered 10,000 No. 2 hard wheat on that day from the Hintz & Lint Company to make up the loss of the 10,000 bushels.

Q. Why did you purchase from them particularly rather than somebody else?

A. They happened to offer the wheat a little cheaper than the other people. I paid them $1.11.

The first communication with the Kaw Grain & Elevator Company that we had was made some time in the beginning of the year 1902, being a request sent by me for the Commercial Milling Company over the Western Union wires, asking for price upon wheat, and since that time there have been frequent dealings between us, all of them carried on by means of telegraphic communication. The telegraph is used almost exclusively in the purchase and sale of wheat.

I don't recall whether this telegram was paid for or not, but I have paid all bills presented by the Western Union. The Western Union bills are not itemized. We don't check these bills. It is customary on the Board of Trade to send so many telegrams, that it would be hard to keep track of them. We take the Western Union's word of what we owe them, and pay them; that is customary.

It is agreed between counsel that the telegram sued upon in this case was paid for by the Commercial Milling Company; that the price was fifty cents, which was tendered in open court.

Deposition of ALEXANDER MCKENZIE, a witness produced and examined on the part of the plaintiff, was read as follows:

13 In August, 1904, I was in the grain business as general manager of the Kaw Grain & Elevator Company. I had active charge of the buying and selling of grain for the Kaw Grain & Elevator Company. Exhibit E (See Exhibit 2) is a carbon copy of a telegram that I sent to the Commercial Milling Company, of Detroit, in the name of the Kaw Grain & Elevator Company, on August 15th, 1904. The Kaw Grain & Elevator Company did not receive any response to that telegram on that date. The first notice we received was a letter on the 17th, I think. There was no telegraphic response to that telegram prior to the receipt of this letter that I know of. Telegrams delivered to the Kaw Grain & Elevator Company are delivered to me. Exhibit F is a letter from the Commercial Milling Company, confirming sales made to them by the Kaw Grain & Elevator Company, and was received, I suppose, on the 17th of the month by United States mail. Upon receipt of this letter we immediately wired the Commercial Milling Company, as per this telegram of the 17th. Exhibit G (See Exhibit 4) is a carbon copy of the telegram.

The market value of No. 2 hard wheat on August 17, 1904, ranged from $1.01 to 99c. per bushel in Kansas City. In my telegram of August 15th in which I offered to sell 10,000 *mushels* No. 2 hard at $1.01, the place of delivery was Detroit. All prices we had quoted them were made delivered to Detroit, all offers—the place of delivery is just a question of custom.

Cross-examination.

I notified the Commercial Milling Company on the 17th by telegram marked Exhibit G, that we had not received the telegram in question, and we received from them an acknowledgment of the receipt of this telegram by mail.

Upon receipt of this letter, dated August 15th, marked Exhibit F, I do not think I made the Commercial Milling Company another offer upon No. 2 hard wheat, and I think I did not make any offer upon any kind of wheat with which to fill this 10,000 bushel offer after the 17th day of August, 1904.

Recalled by plaintiff.

The rate of freight on No. 2 hard wheat between Kansas City, Missouri, and Detroit, Michigan, was 15 cents per 100 lbs., or 9 cents per bushel.

Q. At the time the telegram of August 15th, 1904, was sent to the Commercial Milling Company, did the Kaw Grain & Elevator Company or not have on hand ten thousand bushels of No. 2 hard wheat?

A. They had that amount on hand.

Q. If the Kaw Grain & Elevator Company had received an acceptance of the offer made by telegram on August 15th, would that contract have been filled?

A. The contract would have been filled.

Q. State whether or not, Mr. McKenzie, all of the offers of the Kaw Grain & Elevator Company, which were accepted by the Commercial Milling Company were filled by the Kaw Grain & Elevator Company?

A. Yes, they were all filled.

The Kansas City Daily Price Current, which is the official price current of the Kansas City Board of Trade, was identified, introduced in evidence, and shows that on August 17, 1904, there were actual sales of No. 2 hard wheat on the Kansas City Board of Trade as follows:

"1 car Turkey at $1.01 per bushel; 1 car Turkey at $1.00½ per bushel; 16 cars at $1.00 per bushel; 1 car at 99 cents per bushel."

Plaintiff rested.

Defendant thereupon renewed its motion to strike out the testimony on the ground that under the claim of the contract the
15 plaintiff is not entitled to recover except 50 cents.

The COURT: In the limited time I have had to examine this matter I am not satisfied but what the State has a right to make a reasonable regulation with reference to all companies with reference to making contracts, and it does not seem to me that restraining or passing a law, which shall inhibit any corporation from stipulating against its own negligence is in any way in controversion of the regulation of commerce between foreign nations or other states, or any limitation upon the interstate commerce, and in view of the decision of other states I cannot but come to the conclusion that the very purpose of this act was to preclude the telegraph companies from stipulating against their own negligence, and for these reasons it does seem to me that with the light that I have at the present time that it is not within the power of the court to remove this cause from the jury.

Whereupon defendant's motion was denied, to which ruling defendant excepted.

ALFRED E. COX, a witness produced and examined on the part of the defendant, testified as follows:

I am a telegraph operator and have been such for about twenty years. I am now employed with the Western Union Telegraph Company in Detroit. I do most of my work in the main operating room of the Western Union Company at No. 100 Griswold street. I worked on the Board of Trade probably two or three years and am familiar with the way work is done there. There is a special through wire running from the Detroit Board of Trade to the Chicago Board of Trade with no stations between.

On August 15th, 1904, I was at work at the Board of Trade, both sending and receiving operator. The purpose of the
16 special wire running from the Detroit Board of Trade to the Chicago Board of Trade is for handling the grain orders. Other business goes upon the wires when it is not busy with grain business but this wire is held for the purpose of special accommodation of the grain business on the Board of Trade from the opening of the Board until the close of it. That is what it is used for. It is held for the grain business. It was so held on the 15th day of August, 1904.

I recognize Exhibit 1. The marks on the left hand lower corner are mine. When the message is being transmitted those marks are made with the left hand at the time the message is being sent with the right. These marks are the number, No. 40, and the office that it is sent to, EX, the time it was sent, 12:56 p. m., and it is sent by operator AC, which is myself, those are my initials. It was received by operator 2M. 2M is his signing or the letters or figures that he uses, just the same as I use AC—the signing of the operator in EX—Chicago office. These marks indicate the office to which the message was sent, the time, 12:56 p. m., the initials of the operator sending the message, and the name or mark of the receiving operator at Chicago. I could not state how many times I have been in connection with Mr. 2M in that manner, it was so very many. It has been every day for a period of months. I should judge it would be something under a hundred a day, I could not say just the number of times. I was there about three years so that the number would run up into the thousands that I called the Chicago operator and sent him messages. I should think it would be in the thousands. As soon as the message was handed to me, I would immediately indicate to the Chicago office that I had a message for him. That is done by giving his call—EX. Then his signal in return is the letters I-I, which means "All right, I am here, go ahead." Then I
17 immediately start to send the message, numbering it. When I got the message through and was done with it—when I stopped at the finish of this message—the Chicago operator gave me his O. K., 2M, which means that it has been received and is O. K. From my long continued method of doing business with him I have every reason to believe that he got the message in Chicago. I have not doubt about it. The proofs are there (pointing to telegram, Exhibit 1). From the time the message was handed to me until I got the Chicago signal was about one minute.

Cross-examination:

I know that we have a special wire running to Chicago that has no other stations on it because I worked the wire for such a length of time, a wire with no stations except Chicago. My hours at the Board of Trade at that office were from 9 in the morning until 2 in the afternoon. I never worked any other office on that line. That is what I base my statement on. There might be two or three operators there in Chicago that answered this wire but this man worked it regularly. But when he would go to lunch or have to leave the work for any time, why he would probably be relieved by someone else. There is nothing particular to bring this message to my mind other than my own marks on there. I could not pick it out from any other except by my own marks. That is the way I identify it.

Redirect examination:

If other messages were coming through from other stations on that wire, I would hear them. I have been a telegraph operator for twenty years and from my knowledge of the operation of telegraphy and the use of the wires, I do not believe there was any other station on that line. If there had been I would have known it. No message could be sent without my hearing it. I don't think a
18 message could go in the air, run out, without being detected. It might just for a moment but it would be immediately detected, as soon as you started the next one. You would get no response. I cannot understand how it could. The only means of knowing what has become of your message is this very signal by the receiving operator. When we get that, we know it has got there, we know that it has gone through, and, if he repeats it back, then we know whether or not he has got it correct. This O. K. mark is a sign that is required, for we must know if the operator received it. I know that it was received at Chicago by the fact that I called him and that I sent it and that I received this O. K. with his initials.

I worked the Chicago wire but I could not say whether that wire was used to go to other stations or other parts at other times of day when I was off duty. Each office has its own signal and each operator their own signature. I never head any signal or call on this line for other stations. After the grain market was over, I could not say what the wire might have been used for at that time. There might have been other stations on it then, after that time, so far as I know, after my time was up.

Thereupon the defendant submitted the following requests to charge:

(Title of Court and Cause.)

Defendant's Requests to Charge.

I.

The message for the non-delivery of which suit is brought is an unrepeated message and, under contract between the parties, the de-

fendant is not liable beyond the amount which it received for sending it.

19

II.

The statute, Compiled Laws, Section 5268, does not apply to this case; it is not a prohibitory statute and therefore does not prohibit contracts like the one made by the parties to this suit. Either party had a right to waive any statutory or other privileges or rights which it had.

III.

This suit is in assumpsit upon a contract which the parties made for the transmission of a message from Detroit to Kansas City, Missouri. The plaintiff, therefore, must recover upon the contract or not at all, and, the contract having provided that the defendant should not be liable beyond the amount which it received for sending it, which was fifty cents, and the same having been tendered, it cannot recover.

IV.

The message which plaintiff sent was intended to go to Kansas City, Missouri. It was therefore interstate commerce and the statute of Michigan, Section 5268, cannot be held to apply to it.

V.

If the court holds that the statute, Section 5268, is prohibitory, then it is void as an attempted regulation of interstate commerce and is a violation of paragraph 3, Section 8, Article 1 of the Constitution of the United States.

VI.

There is no evidence tending to show that the plaintiff took any steps to purchase wheat when informed by wire that its acceptance had not been received. The plaintiff was familiar with the market and in daily touch with it and knew that it was rapidly rising. It was the duty of its agents under such circumstances to take prompt and immediate steps to make the loss as small as possible.

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VII.

The plaintiff did not take steps to purchase wheat as soon as notified of the failure to receive its telegram and therefore cannot recover damages in this case.

VIII.

There is no proof that the plaintiff could not have purchased wheat of the Kaw Grain and Elevator Company, at the time the telegram was received on August 17th and therefore the plaintiff has not made out a case and cannot recover.

IX.

There is no proof in this case that the defendant was negligent.

All of which requests were refused, to which refusal defendant duly excepted.

Thereupon the court charged the jury as follows:

Charge of the Court.

GENTLEMEN OF THE JURY: This action has been brought against the Western Union Telegraph Company by reason of their failure to deliver a telegram. The evidence shows in this case that the Commercial Milling Company of this city received from the Kaw Grain & Elevator Co. on the 15th day of August, 1904, a telegram, as follows:

"KANSAS CITY, MO., *August* 15, 1904.

Commercial Milling Co., Detroit:

Offer, 10,000 2 hard dollar one if quick. This is what Chicago is paying us.

KAW GRAIN & ELEVATOR COMPANY."

Now, the evidence shows that according to trade usages that meant and was understood by the Commercial Milling Co. to be an
21 offer of 10,000 of a certain grade wheat, according to Kansas City inspection known as No. 2 hard wheat at one dollar one cent per bushel, if the telegram was accepted—if the offer was accepted quickly. And the evidence further shows in that case, in response to that telegram, Mr. Henkel, one of the officers of the plaintiff corporation, immediately telegraphed to the Kaw Grain & Elevator Co. at Kansas City, Mo., by the Western Union Telegraph Company, using a Postal Telegraph Co.'s blank, which, however, is immaterial—the telegram which was sent on a blank which says—"Send the following message without repeating, subject to terms and conditions printed on the back hereof, which are hereby agreed to."

It was addressed to the Kaw Grain and Elevator Co. as follows:

"AUGUST 15, 1904.

Kaw Grain and Elevator Co., Kansas City, Mo.:

Accept your offer 2 hard dollar one, ten thousand here.

COMMERCIAL MILLING COMPANY."

Upon the back of that telegram was printed the following:

"Postal Telegraph Cable Company.

This company transmits and delivers the within message subject to the following terms and conditions:

To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the message written

on the face hereof and the Postal Telegraph Cable Co. that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, beyond the amount received for sending the same, nor for mistakes
22 or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless especially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of messages to any point on the lines of the company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz: One per cent. for any distance not exceeding a thousand miles and two per cent. for any greater distance.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of this company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery.

This company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. No employee of this company is authorized to vary the foregoing.

CLARENCE H. McKAY,
President.

JOHN O. STEVENS, *Secretary.*

WILLIAM H. BAKER,
V. P. and Gen'l Manager."

The adjudication of the several courts have held, gentle-
23 men of the jury, I think, beyond any controversy, and no point is made by counsel that the blank used was not the Western Union Telegraph blank, which is, I think, very similar, if not identical with, the blank which is offered in evidence.

Now, the evidence shows that such message was received and by course of business the charges were paid thereon at the expiration of the month, the Commercial Milling Company having an account with the Western Union Company, by which all telegrams were paid for at the end of the month, being presented in the ordinary course of business as any account between merchants. Now, I say to you, gentlemen of the jury, that you are authorized to find in this case, from the failure of the defendant to offer any evidence to the contrary, that this failure to deliver was due to the negligence

of the defendant corporation, and you may in your good judgment find that it is by reason of negligence, from the fact that no explanation of the non-delivery of this message is given on the part of the defendant. The defense in this case offered by counsel is that the written clause which I have read to you printed on the back of the telegram and the notice at the head of the blank, to-wit: "Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to," constituted a contract as between the sender of the telegram, the plaintiff in this case and the Telegraph Company, and that therefore they are not liable under the circumstances of the case for the loss that plaintiff has sustained, or for any loss whatsoever, except the loss which is mentioned in the clause on the back which I have already read. And, gentlemen of the jury, if it were not for the statute of this state, which I think our Supreme Court has never yet construed, I should say that the contention of the defendant
24 was correct, because terms, if not identical with these, at least similar with these (I have not made the comparison) have been held a reasonable contract by the earlier decisions of our Supreme Court; but in the year, I think 1893, an act was passed by the Legislature of the State of Michigan, entitled "An act to prescribe the duties of Telegraph Companies incorporated, whether within or without this state, relative to the transmission of messages, and to provide for the recovery of damages for negligence in the non-performance of such duties.

SECTION 1. The people of the State of Michigan enact that it shall be the duty of all telegraph companies incorporated either within or without this state, doing business within this State, to receive dispatches from and for other telegraph companies' lines and from and for any individual, and on payment of the usual charges for individuals for transmitting dispatches as established by the rules and regulations of such telegraph company, to transmit the same with impartiality and in good faith. Such telegraph companies shall be liable for any mistakes, errors or delays in the transmission or delivery or for the non-delivery of any repeated or non-repeated message, in damages to the amount which such person or persons may sustain by reason of the mistakes, errors or delays in the transmission or delivery, due to the negligence of said company; or for the non-delivery of any such dispatch due to the negligence of such telegraph company or its agents, to be recovered with the costs of suit by the person or persons sustaining such damages."

Now, gentlemen of the jury, it is contended on behalf of the defendant that inasmuch as this is what is called interstate commerce business, that the constitution of the United States prohibits the State of Mchigan, from legislating with reference to the subject matter, and that the statute of this state can have application
25 only to such business as is transacted within the limits of this state. The constitution provides, of course, that Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, and as I have said the contention of counsel is that this provision of the

Legislature of Michigan is not applicable to messages which are sent from one State to another, or from the State to a foreign nation, because it is solely within the power of Congress to legislate thereabout. It does not seem to me, gentlemen of the jury, that this position is tenable—in the absence of any Congressional legislation it seems clear to me that this is not in any sense the regulation of interstate commerce by the State of Michigan, and that it is within their legitimate province to declare that no company, either foreign or domestic, telegraph company, shall relieve itself from liability against its own negligence arising from its own negligence, and this is what I think the act intends to do,—it is to prohibit the companies from making a stipulation with the parties with whom they are doing business, relieving the companies from the consequences of their own negligence. I do not think in the first place that this is in any sense a regulation of interstate commerce, and if it be the regulation of interstate commerce I think it is a proper regulation in the absence of any Congressional legislation upon that subject.

It is urged again by the defendant in this case that the act does not prohibit the contracts between telegraph companies and individuals, and such a contract having been made, the terms of the act not prohibiting it, the contract is valid, but in view of the decisions of other states and of our own state, and in view of the statutes of other states, I think, gentlemen of the jury, it is with this very purpose that the act was framed and passed by the Legislature, and this is the thing that they intended to prevent, and it arises as
26 a necessary implication from the act itself, that this contract is void in the State of Michigan.

For these reasons, gentlemen of the jury, I feel constrained to say that, if you find under the evidence in this case that through the negligence of this company this telegram was not delivered, then the plaintiff is entitled to such damages as it has suffered by reason of the non-delivery of the telegram accepting the offer of the Kaw Grain and Elevator Company.

Now, obviously, it becomes the duty of the Kaw Grain and Elevator Company, on the seventeenth day of August, 1904, when they received the advice—it became the duty of the Commercial Milling Company on the seventeenth day of August when they received the advice from the Kaw Grain and Elevator Company that they had never received the telegram accepting the offer, to use due diligence in providing themselves with such wheat as was necessary to run their business, and it is for you to say, under the circumstances of that case, at what price grain could have been procured at the time, on the seventeenth day of August, when they were advised that the telegram was not received.

Now, you have heard the testimony in this case and that, gentlemen of the jury, is a question for you—if you shall find the circumstances—the existence of negligence—that negligence constituted the reason of the non-delivery, then it becomes your duty to find here what amount of damage was sustained. In other words, for what sum should the Commercial Milling Company have got the grain after the receipt of the notice of the Kaw Grain and Elevator

Co. on the seventeenth day of August? I hardly think it is necessary for me to say more upon that subject. They would be entitled to recover such damages as you find they have suffered, if you find, as I say, that the non-delivery was due to negligence, and
27 they would be entitled, in considering the damage, to have the amount of the difference that they necessarily paid, together with interest at the rate of five per cent. per annum. I hardly think it is necessary to say more.

Mr. JOSLYN: In view of your honor's charge, I desire to get on the record this request—That from the evidence in this case, the plaintiff did not use due diligence in purchasing wheat after notification by the Kaw Grain and Elevator Company of the non-receipt of the telegram.

The COURT: Well, I think that is a proper request, gentlemen of the jury, and, if the testimony here was such as to warrant it, I should say to you, gentlemen of the jury, that the testimony here shows that there was no rise in wheat between the fifteenth and seventeenth in the Kansas City market, and the damage would be nominal—but my recollection of the testimony is that it did advance, and it is for you to say at what price it could have got the wheat on that seventeenth day of August. I therefore refuse the request.

Gentlemen, you may follow the officer.

Thereupon the jury retired and, having been absent for a time, returned into court, and rendered a verdict in favor of the plaintiff and against the defendant in the sum of $960.00, and thereafter judgment upon said verdict was duly entered.

And thereafter the said defendant did move the court to set aside the said verdict and to grant a new trial therein; a copy of said motion for a new trial is as follows:

28 (Title of Court and Cause.)

Motion for New Trial.

Now comes said defendant, by Corliss, Leete & Joslyn, its attorneys, and moves the court to set aside the verdict and judgment heretofore rendered in this cause for the following reasons:

1st. For that the court erred in refusing to direct a verdict in favor of defendant.

2nd. For that the court erred in directing a verdict in favor of the plaintiff.

3rd. For that the court erred in refusing to charge the jury as requested in defendant's several requests to charge numbered I to IX, inclusive.

4th. For that the court erred in charging the jury as follows:

"I say to you, gentlemen of the jury, that you are authorized to find in this case, from the failure of the defendant to offer any evidence to the contrary, that this failure to deliver was due to the negligence of the defendant corporation, and you may in your good judgment find that it is by reason of negligence, from the fact that

no explanation of the non-delivery of this message is given on the part of the defendant."

5th. For that the court erred in charging the jury in substance that Sec. 5268, C. L. Mich. 1897, was intended to prohibit telegraph companies "from making a stipulation with the parties with whom they are doing business, relieving the companies from the consequences of their own negligence."

6th. For that the court erred in charging the jury that the contract entered into by the parties in this cause is void in the State of Michigan.

7th. For that the court erred in charging the jury that
29 the statute, Sec. 5268, C. L. Mich. 1897, is applicable to interstate commerce messages.

8th. For that the court erred in charging the jury that the statute, Sec. 5268, C. L. Mich. 1897, when construed as prohibiting the making of contracts limiting the liability for negligence of telegraph companies, is not, when applied to interstate commerce messages, an interference with interstate commerce and void as being in violation of Par. 3, Sec. 8, Art. 1, of the Constitution of the United States.

8½. For that the statute, Section 5268, C. L. Mich. 1897, when construed as prohibiting the making of contracts between telegraph companies and other persons *sui juris* whereby the liability for negligence of such companies is limited, is null and void because the same is in violation of the 14th amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States, that it deprives such companies and persons with whom they contract of their property without due process of law, and that it denies to such companies and the persons with whom they contract the equal protection of the laws.

9th. For that the record shows that, if there was any negligence on the part of the defendant, such negligence occurred in the State of Illinois, and the statute of Michigan is not intended to have any extra-territorial effect, and is therefore not applicable to the contract made by the parties in this case.

10th. For that the record shows that, if there was any negligence on the part of the defendant, such negligence occurred in the State of Illinois, and the statute of Michigan, so far as it applied to such acts of negligence, is null and void as being attempted regulation of and an interference with interstate commerce, in violation of
30 Par. 3, Sec. 8, Art. 1, of the Constitution of the United States.

11th. For that the message for non-delivery of which this suit is brought, was presented for transmission by the plaintiff and was accepted by the defendant under a special written contract between said parties, wherein for a valid consideration it was expressly stipulated that said defendant should not be liable for the non-delivery of said message beyond the amount received for sending the same, and the court erred in holding a part of said contract void, thus making a new contract for the parties which they would not themselves have made.

12th. For that the declaration in this case does not count upon the

statute for neglect of the duties imposed by such statute, but is a declaration in assumpsit upon the contract between the parties, and in this case plaintiff's right to recover must depend upon the terms of such contract and not upon the statute.

13th. For that the plaintiff failed to show any damages whatever, there being no proof that plaintiff could not, on August 17, 1904, have purchased of the Kaw Grain and Elevator Company the wheat offered by it on August 15, 1904, at the price offered on that date.

This motion is based upon the records, files and proceedings in this court in said cause.

CORLISS, LEETE & JOSLYN,
Attorneys for Defendant.

Dated February 5th, 1906.

And thereupon said motion came on for argument and, after hearing counsel thereon, said motion for a new trial was denied. Said court in denying said motion filed the following opinion:

31 (Title of the Court and Cause.)

Opinion.

In this cause I have carefully considered all the various grounds alleged in this motion for a new trial, both at the time of the trial and upon the hearing of this motion, and in my opinion the same are not well founded in law and therefore the motion for a new trial is denied.

GEO. S. HOSMER,
Circuit Judge.

Dated February 19, 1906.

To such ruling of said court and said order in said cause denying said new trial defendant duly excepted.

The foregoing constitutes all the testimony offered in said cause, and all the proceedings therein, and because none of the foregoing exceptions appear of record in said cause, this bill of exceptions has been duly settled and signed this 14th day of April, 1906.

I, George S. Hosmer, Circuit Judge, who presided at the trial of said cause, hereby certify that the foregoing contains the substance of all the evidence in said cause; that such portion of the evidence as is set out by question and answer is necessarily so set out for the purpose of a full understanding of the questions involved.

GEO. S. HOSMER,
Circuit Judge, Third Judicial Circuit of Michigan.

32 EXHIBIT F AND EXHIBIT 3.

Established 1855.

COMMERCIAL MILLING CO.,
DETROIT MICH., *Aug. 15th*, 1904.

Messrs. Kaw Grain & Elevator Co., Kansas City, Mo.

GENTLEMEN: As a result of our telegraphic correspondence to-day we have purchased from you as follows: 30,000 bu. of No. 3 Turkey Hard Wheat at 96c. f. o. b. Detroit and 10,000 bu. of No. 2 Hard Turkey at $1.01, delivered Detroit.

Drafts on this wheat are to be made at sight, shipment to be prompt.

We trust that the quality of this wheat will be good and of the Turkey variety as what we are after is great strength.

We want you to be careful in regard to the weights of these cars. We would prefer to have you ship them our weights. Most of these cars will go through the public elevator of Detroit and be weighed by our Detroit Board of Trade weigh masters so your customers will get just as fair treatment as though they were weighed in Kansas City by the public elevator there.

We dislike claims for shortage very much and prefer not to have any if possible, and, in order to insure correct weights, if your weigh masters will inspect the cars that this wheat is loaded in, being sure that everything is tight and no leaks of any kind and will weigh them carefully, there is no reason why there should be any trouble between us on this point.

Yours very truly,

COMMERCIAL MILLING CO.

RH-FLC Per R. HENKEL.

(Here follow fac-similes marked pp. 33 and 34.)

EXHIBIT "1."

POSTAL TELEGRAPH COMMERCIAL CABLES

CLARENCE H. MACKAY, PRESIDENT.

TELEGRAM

REGISTERED TRADE-MARK. DESIGN PATENT No. 26260.

The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

COUNTER NUMBER.	TIME FILED.	CHECK		
	12.56 M.	9 Chg	40	1 (815)

Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.

To Kaw Grain & El. Co. Aug. 15 1904

Kansas City Mo

Accept your two hard dollar
one ten thousand here.

Commercial Milling Co.

CHARGED

(Note.—Letters and figures in italics are operator's marks.)

40 Ex 12.56 PM Ac 2M

POSTAL TELEGRAPH-CABLE COMPANY IN CONNECTION WITH THE COMMERCIAL CABLE COMPANY.

CLARENCE H. MACKAY, President.
J. O. STEVENS, Sec'y. WM. H. BAKER, V. P. & G. M.

POSTAL TELEGRAPH COMMERCIAL CABLE SYSTEM

CLARENCE H. MACKAY, President.
ALBERT BECK, Sec'y. GEO. G. WARD, V. P. & G. M.

N. B.—BOTH SIDES OF THIS FORM ARE PROTECTED AGAINST INFRINGEMENTS AND IMITATIONS BY DESIGN PATENT No. 20588 AND REGISTERED TRADE-MARK.

THE POSTAL TELEGRAPH-CABLE COMPANY,

(INCORPORATED)

transmits and delivers the within message subject to the following

TERMS AND CONDITIONS.

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal Telegraph-Cable Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

Correctness in the transmission of messages to any point on the lines of the Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance.

No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of this Company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery.

This Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

No employee of this Company is authorized to vary the foregoing.

WILLIAM H. BAKER, V. P. and Gen'l Manager. JOHN O. STEVENS, Secretary. CLARENCE H. MACKAY, President.

Form No. 2.

EXHIBIT "17."

THE WESTERN UNION TELEGRAPH COMPANY.

INCORPORATED

23,000 OFFICES IN AMERICA. CABLE SERVICE TO ALL THE WORLD.

ROBERT C. CLOWRY, President and General Manager.

Receiver's No.	Time Filed		Check
W 11.30/am	11.10 a	13 M	49

SEND the following message subject to the terms on back hereof, which are hereby agreed to.

Aug. 15 1904

To Kaw Grain & Ele Co

Kansas City

13 DE - 11.17 a Mo.

CJ to ey

Accept your offer on 3 hard

at 96 If OH ARGED Turkey variety

Confirm

(Note.—Letters and figures in italics are operator's marks.)

Chgn C. M. Co.

☞ READ THE NOTICE AND AGREEMENT ON BACK. ☜

ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

Correctness in the transmission of a message to any point on the lines of this Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz, one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the Company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

ROBERT C. CLOWRY, President and General Manager.

35 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

COMMERCIAL MILLING COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

Assignments of Error.

And now comes the said defendant, Western Union Telegraph Company, by Corliss, Leete & Joslyn, its attorneys, and says that, in the proceedings and trial of the above entitled cause, there is manifest error as follows:

I. For that the court erred in denying defendant's motions to strike out the testimony given in behalf of the plaintiff on the ground that under the contract the plaintiff was not entitled to recover except fifty cents.

II. For that the court erred in refusing to direct a verdict in favor of the defendant.

III. For that the court erred in directing a verdict in favor of the plaintiff.

IV. For that the court erred in refusing to charge the jury as requested in defendant's first request to charge.

V. For that the court erred in refusing to charge the jury as requested in defendant's second request to charge.

VI. For that the Court erred in refusing to charge the jury as requested in defendant's third request to charge.

VII. For that the court erred in refusing to charge the jury as requested in defendant's fourth request to charge.

VIII. For that the court erred in refusing to charge the jury as requested in defendant's fifth request to charge.

36 IX. For that the court erred in refusing to charge the jury as requested in defendant's sixth request to charge.

X. For that the court erred in refusing to charge the jury as requested in defendant's seventh request to charge.

XI. For that the court erred in refusing to charge the jury as requested in defendant's eighth request to charge.

XII. For that the court erred in refusing to charge the jury as requested in defendant's ninth request to charge.

XIII. For that the court erred in charging the jury as follows:

"I say to you, gentlemen of the jury, that you are authorized to find in this case, from the failure of the defendant to offer any evidence to the contrary, that this failure to deliver was due to the negligence of the defendant corporation, and you may in your good judgment find that it is by reason of negligence, from the fact that no explanation of the non-delivery of this message is given on the part of the defendant."

XIV. For that the court erred in charging the jury in substance that Sec. 5268, C. L. Mich. 1897, was intended to prohibit telegraph

companies "from making a stipulation with the parties with whom they are doing business, relieving the companies from the consequences of their own negligence."

XV. For that the court erred in charging the jury that the contract entered into by the parties in this case is void in the State of Michigan.

XVI. For that the court erred in charging the jury that the statute, Sec. 5268, C. L. Mich. 1897, is applicable to interstate commerce messages.

XVII. For that the court erred in charging the jury that the statute, Sec. 5268, C. L. Mich. 1897, when construed as prohibiting the making of contracts limiting the liability for negligence of telegraph companies, is not, when applied to interstate commerce messages, an interference with interstate commerce and void as being in violation of Par. 3, Sec. 8, Art. 1, of the Constitution of the United States.

XVIII. For that the court erred in charging the jury that "the plaintiff is entitled to such damages as it has suffered by reason of the non-delivery of the telegram accepting the offer of the Kaw Grain & Elevator Company."

XIX. For that the court erred in denying the motion for a new trial made by said defendant upon the grounds stated therein, and in holding that none of said grounds are well founded in law.

Wherefore the said defendant and appellant, by reason of the errors alleged as aforesaid, prays that the judgment aforesaid be set aside and reversed.

CORLISS, LEETE & JOSLYN,
Attorneys for Defendant.

37 Said cause was brought to the Supreme Court of Michigan, by Writ of Error, where the following proceedings were had:

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the nineteenth day of February, A. D. 1907.

Present: Hon. Aaron V. McAlvay, Chief Justice; Hon. Robert M. Montgomery, Hon. Russell C. Ostrander, Hon. Frank A. Hooker, Hon. Joseph B. Moore, Associate Justices.

No. 21675.

COMMERCIAL MILLING COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

This cause coming on to be heard is argued by counsel in part.

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room in the Capitol, in the City of Lansing, on the twentieth day of February, A. D. 1907.

Present: Hon. Aaron V. McAlvay, Chief Justice; Hon. Robert M. Montgomery, Hon. Russell C. Ostrander, Hon. Frank A. Hooker, Hon. Joseph B. Moore, Associate Justices.

No. 21675.

COMMERCIAL MILLING COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

The argument heretofore commenced herein is concluded and the cause submitted.

Subsequently a re-argument, before the full bench, was ordered by the Court.

38 At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, the eight- day of October, A. D. 1907.

Present: Hon. Aaron V. McAlvay, Chief Justice; Hon. William L. Carpenter, Hon. Claudius B. Grant, Hon. Charles A. Blair, Hon. Robert M. Montgomery, Hon. Russell C. Ostrander, Hon. Frank A. Hooker, Hon. Joseph B. Moore, Associate Justices.

No. 21675.

COMMERCIAL MILLING COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

This cause coming on to be heard on a re-argument ordered by the Court is argued by counsel and submitted.

39 *Opinion.*

STATE OF MICHIGAN:

Supreme Court.

COMMERCIAL MILLING COMPANY, Plaintiff and Appellee,
vs.
WESTERN UNION TELEGRAPH CO., Defendant and Appellant.

Before the Full Bench.

CARPENTER, *J.:*

In the Circuit Court the plaintiff recovered a judgment of $960.00 as the damages resulting from defendant's failure to deliver a telegram sent from Detroit, Michigan, to Kansas City, Missouri. Defendant promptly transmitted this telegram to its relay station in Chicago, and there it was received within a minute or two after it was filed in Detroit. What became of it afterwards we know nothing, except this; it was not delivered. This telegram was written upon a blank upon the face of which appeared the following direction: "Send the following message without repeating, subject to the terms and conditions printed on the back hereof, which are hereby

agreed to." It was signed by plaintiff's President and General Manager. Among the conditions referred to upon the back of said blank was this: "It is agreed * * * that the said company shall not be liable * * * for non-delivery of any unrepeated message beyond the amount received for sending the same." Was this agreement valid? That is the material question to be determined in this case. The trial court held that it was not. He held it was prohibited by Sec. 1 of Act No. 195 of the Public Acts of 1893. That Section reads as follows:

"That it shall be the duty of all telegraph companies incorporated either within or without this State, doing business within this State, to receive dispatches from and for other telegraph companies' lines, and from and for any individual, and on payment of their
40 usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph companies, to transmit the same with impartiality and good faith. Such telegraph companies shall be liable for any mistakes, errors or delays in the transmission or delivery, or for the non-delivery of any repeated or non-repeated message, in damages to the amount which such person or persons may sustain by reason of mistakes, errors or delays in the transmission or delivery, due to negligence of such company, or for the non-delivery of any such dispatch, due to negligence of such telegraph company or its agents, to be recovered with costs of suit, by the person or persons sustaining such damage."

Assuming though not deciding that the Legislature of the State of Michigan in enacting the law above set forth intended to the extent of its authority to prohibit the making of such contracts as that in question—and upon this assumption only can the plaintiff succeed—the question arises whether the statute construed in accordance with this intention can have any application to the contract in question. That is a contract whereby the defendant agreed to transmit for the plaintiff a message from Detroit, Michigan, to Kansas City Missouri. In performing this contract defendant was engaged in interstate commerce. In the absence of a prohibitory statute the parties had a right to embody in said contract the provision limiting liability under consideration. This is settled by our own decisions. Western Union Telegraph Co. *vs.* Carew, 15 Mich. 525. Birkett *vs.* Western Union Telegraph Co., 103 Mich. 361. Jacobs *vs.* Western Union Telegraph Co. 135 Mich. 600. That is also the doctrine of the Supreme Court of the United States. Primrose *vs.* Western Union Telegraph Co., 154 U. S. 1. The effect of the decision of the trial court then is to declare that the State of Michigan has deprived defendant of its right to make a contract which otherwise it might make for transmitting a message from one state to another.

Does this construction make the statute unconstitutional as an interference with the right of Congress to regulate commerce
41 between states? In answer to this question we need do nothing more than quote from decisions of the Supreme Court of the United States and those decisions are authoritative. Said that

Court, speaking through Mr. Justice Bradley, in Walling *vs.* Michigan, 116 U. S. 455:

"We have so often held that the power given to Congress to regulate commerce with foreign nations, among the several States and with the Indian tribes, is exclusive in all matters which require, or only admit of, general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we deem it necessary merely to refer to our previous decisions on the subject, the most important of which are collected in Brown *vs.* Houston, 114 U. S. 622, 631, and need not be cited here. We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammelled; and that any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. Welton *vs.* Missouri, 91 U. S. 275, 282; County of Mobile *vs.* Kimball, 102 U. S. 691, 697; Brown *vs.* Houston, 114 U. S. 622, 631."

In accordance with these principles was decided the case of Wabash, Etc., Railway Co. *vs.* Illinois, 118 U. S. 577. To show what was there decided I quote the headnotes of that opinion, the correctness of which I have verified:

"A statute of Illinois enacts that, if any railroad company shall, within that state, charge or receive for transporting passengers or freight of the same class, the same or a greater sum for any distance than it does for a longer distance, it shall be liable to a penalty for unjust discrimination. The defendant in this case made such discrimination. The defendant in this case made such discrimination in regard to goods transported over the same road or roads, from Peoria, in Illinois, and from Gilman, in Illinois, to New York; charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer to New York than the latter, this difference being in the length of the line within the State of Illinois. Held:

42 "(1.) This court follows the Supreme Court of Illinois in holding that the statute of Illinois must be construed to include a transportation of goods under one contract and by one voyage from the interior of the State of Illinois to New York.

"(2.) This court holds further that such transportation is 'commerce among the states,' even as to that part of the voyage which lies within the State of Illinois, while it is not denied that there may be a transportation of goods which is begun and ended within its limits, and disconnected with any carriage outside of the state, which is *not* commerce among the States.

"3. The latter is subject to regulation by the state, and the statute of Illinois is valid as applied to it. But the former is national in its character, and its regulation is confided to Congress exclusively, by that clause of the Constitution which empowers it to regulate commerce among the States.

"It follows that the statute of Illinois, as construed by the Supreme Court of the State, and as applied to the transaction under

consideration is forbidden by the Constitution of the United States, and the judgment of that court is reversed."

The subject of commerce in the foregoing cases was goods and not telegraph messages. But this is a distinction of no consequence, for in the case of Telegraph Company *vs.* Texas, 105 U. S. 460, it was held "that a telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods," and that "both companies are instruments of commerce and their business is commerce itself."

Western Union Telegraph Co. *vs.* Pendleton, 122 U. S. 347, is an interesting case. In that case the telegraph company had undertaken to transmit a message from Shelbyville, Indiana, to Ottumwa, Iowa. It did not deliver this message at Ottumwa as required by a statute of the state of Indiana. Suit was brought in Indiana and the Supreme Court of that State held the statute applicable and the telegraph company liable for the penalty therein imposed.

43 The Supreme Court of the United States held this statute unconstitutional. The opinion was delivered by Mr. Justice Field. After referring to the case of Pensacola Telegraph Co. *vs.* Western Union Telegraph Co., 96 U. S. 1, and Telegraph Company *vs.* Texas, 105 U. S. 460, he said:

"In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power; and it is also held that the states can impose no impediments to the freedom of that commerce. In conformity with these views the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose, as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power. Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states."

"The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different states, if each state was vested with power to control them beyond its own limits."

It is scarcely necessary to state the conclusion to be drawn from these authorities and these quotations. The right which a telegraph company has to make contracts for the transmission of interstate messages cannot be taken from it by a state. If it is, commerce is not "free and untrammeled" as according to the will of Congress it should be.

It is said that the statute deprives defendant of no right because it has no right to be negligent. This argument is plausible but is altogether specious and inapplicable. Defendant did have the

right to enter into a contract limiting its liability in the event of negligence; that was a valuable right and of that right the statute deprives it.

It is said that the contract was made in Michigan and that
44 its validity is to be determined by the laws of Michigan. This is true. But, by what laws? Manifestly by the constitutional laws of Michigan and not by the unconstitutional laws. The principle invoked is then of no service. It does not aid in determining the question at issue. Does the constitution of the United States prevent the Michigan law applying to this case? That is the question and that question has been determined by the decisions of the Supreme Court of the United States, and those decisions are controlling.

Our attention is called to various decisions which plaintiff insists are opposed to these views. Some of them are decisions by state courts. We do not discuss them further than to say that if they hold the doctrine contended for by plaintiff they are opposed to the decisions of the Supreme Court of the United States, and we must disregard them.

We do however think it proper to review two of the decisions of the Supreme Court of the United States upon which plaintiff places great reliance. These cases are Western Union Telegraph Co. *vs.* James, 162 U. S. 650, and Pennsylvania Etc. Railway Co. *vs.* Hughes, 191 U. S. 477. In Western Union Telegraph Co. *vs.* James, the court gave effect to the statute of the State of Georgia which provided a penalty for the failure of the telegraph company to make prompt delivery within the state of Georgia of a telegram coming from another state. The distinction between that case and the case at bar is this, as shown by the following quotation from the opinion of the court:

"A provision for the delivery of telegraphic messages arriving at a station within a state * * * would have no such effect upon the conduct of the telegraph company with regard to the performance of its duties outside the state. No attempt is here made to enforce the provision of the state statute beyond the limits of the state, and no other state could by legislative enactment affect in any degree the duty of the company in relation to the de-
45 livery of messages within the limits of the state of Georgia. * * * But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states."

The case of Pennsylvania, Etc., Railway Co. *vs.* Hughes, *supra,* is also easily distinguishable. There suit was brought in the courts of Pennsylvania for the recovery of damages to a horse shipped from a point in the state of New York to a point in the State of Pennsylvania. The horse was damaged in the state of Pennsylvania. The shipment was made under a bill of lading which limited the carrier's liability. This limitation was valid according to the common law as construed by the courts of New York. It was invalid by the common law as construed by the courts of Pennsylvania. The Supreme Court of Pennsylvania adhered to its own construction

of the law and held that within that state the limitation was invalid. In the Supreme Court of the United States the carrier contended that this decision was erroneous upon two grounds. First, because the validity of the contract was to be determined by the laws of the state of New York where it was made and not by the laws of Pennsylvania. This question the Supreme Court of the United States refused to determine because it was not a Federal question. Second, it was contended that the judgment of the Supreme Court of Pennsylvania was erroneous because it was in conflict with the Interstate Commerce Act passed by Congress. The Court held that there was in this Act no "regulation of the matter in controversy," and that therefore the question was ruled against the carrier by the case of Chicago, Etc. Milwaukee Railway Co. *vs.* Solan, 169 U. S. 133, and the reasoning in that case was quoted and said to be "virtually decisive." This disposition of the case requires us then to examine Chicago, Etc. Milwaukee Railway Co. *vs.* Solan, and its reasoning.

There suit was brought in the courts of Iowa by a drover to recover damages for injuries sustained in that state in consequence of the negligence of a railroad company while transporting him and
46 the cattle in his charge from Rock Valley, Iowa, to Chicago, Illinois. The shipper had signed a contract limiting the liability of the carrier for any injury to the person in charge of said stock to the amount of $500. The Supreme Court of Iowa held this contract void because it was prohibited by an Iowa Statute. The Supreme Court of the United States affirmed this judgment, saying:

"A carrier exercising his calling within a particular state although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of non-feasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. * * * The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon this particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits. * * * The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles."

47 The distinction between the Hughes and Solan cases on the one hand and the case at bar on the other is clear. In the Hughes and Solan cases the state statute was given a local

application—an application within the territorial limits of the state enacting the statute. In the case at bar it is sought to give the statute of Michigan extra-territorial application. It is sought by that statute to restrict defendant's right to carry messages between points in different states and to make it liable for an act done in another state. There is certainly nothing in the reasoning used in deciding the Hughes and Solan cases to indicate that a state has authority to enact a statute which shall affect interstate commerce in another state. Indeed, that reasoning clearly points to the opposite conclusion. If it is true that in the absence of congressional legislation each state may regulate interstate commerce within its own borders, it follows that that commerce cannot be regulated by another state, and this is precisely what was decided in Western Union Telegraph Co. *vs.* Pendleton, 122 U. S. 347, heretofore referred to. It is interesting to compare that case and the case of Western Union Telegraph Co. *vs.* James, 162 U. S. 650, also heretofore referred to. In the Pendleton case the right of the state of Indiana to enact a statute regulating the delivery of telegrams in the State of Iowa was denied. In the James case the right of the state of Georgia to enact a statute regulating the delivery of telegrams within the state of Georgia was affirmed. It may then be said that the Supreme Court of the United States has decided that in the absence of congressional legislation, each state may—within certain limits, at least—regulate interstate commerce within its borders, and that no state may regulate such commerce within the borders of another state, and the Hughes case and the Solan case are in harmony with this statement. The authority of the State of Michigan to enact the statute under consideration is not affirmed by the decision in the Hughes case or in the Solan case, or by any other decision of the United States Supreme Court, but it is denied by the decisions cited earlier in this opinion.

48 The constitution of the United States then prevents the statute having any application in this case. It follows that if the legislature intended that it should apply to such a case the United States Constitution forbids effect being given to such intention. There is, however, nothing to indicate such an intent. Nor is such intent to be presumed. It is rather to be presumed that the legislature intended to enact a law which would be wholly constitutional. The law should be construed in accordance with this presumed intent, (Cooley's Const. Limt. 7th Ed. p. 225) and as thus construed it applies to contracts to transmit messages between points within this state.

In the opinion of Justice Ostrander it is said:

"If this court should be of the opinion that the rule of the Carew case should be denied and that sound public policy, in view of changed conditions, prohibited the defendant from limiting its liability for its negligence, by contract, condition, rule, or stipulation, the application of the announced rule to the present case would have required a denial of defendant's contention. No different question is presented when the decision of the state court is reached by applying a statute of the state."

To this I cannot agree. In determining that the common law rule announced in the Carew case shall be denied and in determining that the statute applies to this case the court is called upon to consider two radically different questions. In determining that the common law rule announced in the Carew case should be denied the court is called upon to consider and answer in the affirmative this question Does the common law prohibit the contract under consideration? In determining that the statute applies to this case, the court is called upon to consider and answer in the affirmative this question: Can a statute of a state deny to one engaged in interstate commerce the right which he theretofore possessed of making a contract limiting his liability? It is true that we may
49 avoid considering the second question by answering the first in the manner suggested, viz., by overruling the Carew case, and it is also true that if we adopt that course our decision would be final. For it could not be reviewed by the Supreme Court of the United States under the existing law. Delmas *vs.* Insurance Co., 14 Wall. 661, Penn. R. R. Co. *vs.* Hughes, *supra.* I do not understand, however, that any member of this court is willing to pursue that course. The doctrine of the Carew case has for many years been regarded by the profession as a correct statement of the common law; it has been twice approved by subsequent decisions of this court, and the circumstance that since its announcement it has received the approval of the Supreme Court of the United States adds much to its weight. It is true the legislature has seen fit in its wisdom to change this law. There is an implied suggestion in the reasoning of my Brother Ostrander that sound public policy growing out of "changed conditions" requires a denial of the rule as laid down in the Carew case. I am aware of no other changed condition than the enactment of the statu*g*e—a statute enacted it must be presumed with the legislative purpose of changing the common law. Surely such a statute affords no reason for our declaring that the statute had any effect upon the principles of the common law. We are bound to say that those principles were not affected by the statute. We are bound to determine this case then upon the assumption that according to the principles of the *the* common law the defendant had a right to make the contract in question, and upon this assumption we must determine the question heretofore alluded to as the second question, viz: Can the statute of a state deny to one engaged in interstate commerce the right which under the principles of the common law he possessed, of making a contract limiting his liability? We cannot determine this question in the affirmative by saying "we deny the right of one engaged in interstate commerce to make such a contract," for we do not deny that right; on the contrary, we affirm it. We must answer this question by a
50 process of reasoning very different from that used in answering the first question, and we cannot answer it in the affirmative, as I have endeavored to show, without giving to the statute a construction repugnant to the cons*i*tution of the United States. And that decision—and I state this not with the thought that it strengthens this opinion, but with the thought of illustrating the dif-

ference between these two questions—may be reviewed by the Supreme Court of *of* the United States. See Delmas *v.* Insurance Company, *supra.*

We hold, therefore, not that the statute under consideration is unconstitutional, but that as properly construed, it has no application to this case. From this reasoning it results that the judgment under review is erroneous and should be reversed and a judgment entered in plaintiff's favor for the small amount paid for transmitting the message and defendant should be awarded costs of both courts. This course cannot, however, be taken. Four of the eight justices constituting this Court reject the views stated in this opinion and for reasons stated in the opinion of Justice Ostrander decide that plaintiff is entitled to recover its full damages. As their views agree with the judgment of the trial court, they are controlling and consequently that judgment must be affirmed.

WILLIAM L. CARPENTER.
FRANK A. HOOKER.
R. M. MONTGOMERY.
CLAUDIUS B. GRANT.

(Endorsed:) Filed May 17, 1908. Chas. C. Hopkins, Clerk.

51 Supreme Court.

COMMERCIAL MILLING COMPANY, Plaintiff and Appellee,
v.
WESTERN UNION TELEGRAPH COMPANY, Defendant and Appellant.

Before the Full Bench.

OSTRANDER, *J.:*

In point of time, the statute considered here was passed after this court had, in the absence of a statute, held that regulations similar to the one in question, limiting the liability of a telegraph company for mistakes and delays in transmitting messages and for failures to deliver them, were not unreasonable. The statute is entitled "An act to prescribe the duties of telegraph companies incorporated either within or without this state, relative to the transmission of messages, and to provide for the recovery of damages for negligence in the performance of such duties." The duties of telegraph companies with respect to the transmission of messages arise not alone upon the terms of express contracts which they make but, also, upon the nature of the business carried on and the interest of the public in the manner of conducting the business. They are not common carriers and they would not, at common law, be liable for mistakes or for delays or failures for which they were not, exercising proper care, responsible. It must be assumed that the legislature, taking into account this rule of law and the one established by this
52 court, and already referred to, attempted to change, not the rule affecting liability for such miscarriages as proper care would have prevented, but the rule that for miscarriages for which

they were responsible they might limit liability by contract or by conditions imposed upon senders of messages. If this statute is not considered to have this effect, it seems an entirely useless and ineffectual legislative effort. In reaching this conclusion, neither the reasoning employed nor the authority of the ruling made in McMillan *v.* M. S. & N. I. Ry. Co., 16 Mich., 79, is questioned. Assuming the intent and the effect of the legislation to be what I have stated it to be, it follows that the word negligence employed in the statute does not mean a tort or wrong of defendant distinct from its express or implied contract obligations, but it means such a failure to perform its duty as at the common law would render it liable for the consequences. It must be held that the proper construction of the statute and its effect is to forbid a limitation of liability for the consequences of those miscarriages for which at common law such companies are liable and to this extent to make void the stipulation, contained in the contract, which reads:

"It is agreed that the company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message beyond the amount received for sending the same." * * *

The declaration of the plaintiff is in assumpsit and counts upon the contract and avers breach thereof. The message was delivered by plaintiff at Detroit, Michigan, addressed to a corporation in Kansas City, in Missouri. The evidence shows the message was transmitted by defendant to its Chicago office and, fairly, that it was sent no further. It was not delivered at Kansas City. The reason for
failure to deliver was, it may be inferred, failure to transmit
53 beyond Chicago. No reason appears for failure to so transmit. Plaintiff, during the same day that the message in question was sent and was lost, sent to and received from the same party at Kansas City various messages by defendant's service. The jury found, and was warranted in so doing, that the miscarriage was the consequence of defendant's negligence.

I am of opinion that the legislature intended its action to be coextensive with its authority to act and that the statute should be given the broadest possible application. The case presented, then, is this: The contract was made in this state, is single, involves in its performance service of defendant within and without this state, for a single charge. It may be assumed that the service which was performed within the state was perfect and that miscarriage occurred beyond its boundaries. For the consequences of the miscarriage, a breach of common law and of contract duty, the plaintiff, who sent the message, has brought a suit upon the contract in a court of this state. Defendant insists that its liability for the consequences of its miscarriage is to be determined by the stipulation, found in the contract. By the law of the state, the stipulation is of no force or effect. The court so declared. It is contended here that in so doing the court was in error. It will be well to have in mind the effect of the statute as it was applied by the trial court. Undoubtedly, it was the application of a local law to the contract. But the local law does not attempt to state, measure, or define, any duty of defendant,

or to establish, define, or fix, the consequences of its miscarriage. The liability of defendant is established without reference to the statute. It is when it asks to be discharged therefrom, by giving effect to the stipulation, that the local law becomes, if at all,
54 effective. These considerations answer those objections which are based upon the notion that the local law has been given extra-territorial effect and they require, also, that this case and Western Union Tel. Co. *v.* Pendleton, 122 U. S., 347, shall be distinguished.

But, it is said, the contract is for interstate service, which fact furnishes a controlling reason why the local law may not be given effect. It seems clear that the application of the statute does not deny to defendant a right, privilege or immunity created by federal authority simply because it denies where formerly the law of the state affirmed, as the law of the federal courts does now affirm, the validity of the stipulation. Western Union Tel. Co. *v.* Carew, 15 Mich., 525; Primrose *v.* Western Union Tel. Co., 154 U. S., 1. The rule referred to was arrived at, in both jurisdictions, by the statement and the application of common law principles. In neither jurisdiction did the rule excuse the non-performance of contracts or, except by agreement lawfully entered into, avoid the consequences of negligent performance thereof. The adoption of the rule by the federal courts conferred upon the defendant no right, privilege or immunity created by federal authority. A reversal of the rule would take away no such right. If this court should be of opinion that the rule of the Carew case should be denied and that sound public policy, in view of changed conditions, prohibited the defendant from limiting its liability for its negligence, by contract, condition, rule, or stipulation, the application of the announced rule to the present case would have required a denial of defendant's contention. No different question is presented when the decision of the state court is reached by applying a statute of the state.

55 The statute as applied by the court below does not, in fact, regulate commerce among the several states, interfere with it in any way, tax or burden it, place obstacles in the way of entering into or performing contracts of commerce. If, as so given effect, the statute is invalid as an exercise of power belonging to the congress, it is because the silence of congress upon the subject is equivalent to an express enactment that the subject should be let alone. That congress has not acted is plain and the ruling of the court below was not in contravention of any federal statute. It may be admitted that the constitutional power of congress over commerce among the states would sustain a federal law fixing the terms of contracts for interstate telegraphic service, including a rule of liability of the companies for negligence. In the absence of such legislation, the judgments of state courts refusing to give effect to similar stipulations in contracts for interstate transportation, have twice been affirmed by the Supreme Court of the United States, although such stipulations are, in cases coming under the jurisdiction of federal courts, held to be valid. Pennsylvania R. Co. *v.* Hughes, 191 U. S., 477; Chicago, etc., R. Co. *v.* Solan, 169 U. S., 133. It is true that

the actions in both of these cases were predicated of a tort, a wrong, and were brought in the states, respectively, in which the negligent injury occurred. But in each case the stipulation relied upon by the defendant company was, in terms, agreed to by the plaintiff, in a contract for interstate transportation. It was the agreed measure of plaintiff's recovery. In one case the stipulation was prohibited by a statute of the state where the contract was made and sought to be enforced, in the other it was valid in the state where it was
56 made and was held to be invalid, by judicial interpretation, in another state. These cases seem to lay down the rule that where a carrier, or connecting carriers, under a single contract for carriage, transports persons or goods through various states, such a stipulation as is here in question may be enforced, or its validity denied, in either of the states in which a specific act of negligence, and resulting damage, occurs, according to the law of that state. If there had been federal legislation fixing the stipulation as a part of the contract, the judgments in both of these cases must have been reversed.

What has been said disposes, adversely to appellant, of the contention that its right to freely make contracts has been invaded. I am not convinced that the court below was in error in determining the rights of the parties to this contract according to the law of the state. By that law the stipulation which defendant asks to have enforced is void. I am, therefore, for affirmance of the judgment.

RUSSELL C. OSTRANDER.
JOSEPH B. MOORE.
AARON V. McALVAY.
CHAS. A. BLAIR.

(Endorsed:) Filed May 17, 1908. Chas. C. Hopkins, Clerk.

57 *Judgment.*

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventeenth day of March in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable Claudius B. Grant, Chief Justice; Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, William L. Carpenter, Aaron V. McAlvay, Associate Justices.

No. 21675.

COMMERCIAL MILLING COMPANY, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant and Appellant.

The record and proceedings in this cause having been removed to this Court by Writ of Error, issued to the Circuit Court for the

County of Wayne, and the same and the matters and proceedings therein, having been seen and inspected and duly considered by the court, and the court being equally divided upon the question of reversing the judgment of said Circuit Court, Thereupon, in accordance with the statute, it is ordered that the judgment of said Circuit Court for the County of Wayne stand affirmed, with costs to the plaintiff, to be taxed.

58 STATE OF MICHIGAN:

In the Supreme Court.

COMMERCIAL MILLING COMPANY, Plaintiff,

vs.

WESTERN UNION TELEGRAPH COMPANY, Defendant & Appellant.

To Hon. Claudius B. Grant, Chief Justice of the Supreme Court of Michigan:

The petition of the Western Union Telegraph Company respectfully shows:

That it is defendant and appellant in the above entitled cause, which was commenced in the Circuit Court for the County of Wayne by the Commercial Milling Company *vs.* this defendant, in which court and cause a judgment was rendered against your petitioner; that said cause was removed to this court by a writ of error, where said judgment of said Circuit Court was affirmed by a divided court; that there were presented to said Circuit Court and this Court certain federal questions among others which were decided adversely to your petitioner, as follows:

I. Section 5268 of the Compiled Laws of the State of Michigan was held to prohibit contracts between telegraph companies and other persons *sui juris* limiting liability for negligence in transmission of telegraph messages; and so construed abridges the privileges and immunities of such companies and deprives them of their property without due process of law and denies to them the
59 equal protection of the law, contrary to the provisions of the 14th Amendment of the Constitution of the United States.

II. That said statute so construed is an interference with interstate commerce and in violation of Section 8 Paragraph 3 of the Constitution of the United States.

III. This court by an equal division affirmed the judgment of the Circuit Court below that such statute prohibits the making of contracts limiting the liability of telegraph companies in the transmission of messages.

Wherefore your petitioner prays for an order allowing the issue of a writ of error to remove said cause and the records therein to the Supreme Court of the United States for review, and for a citation directed to said Commercial Milling Company admonishing it to

appear at the Supreme Court of the United States, pursuant to said writ of error.

WESTERN UNION TELEGRAPH COMPANY,
By C. D. JOSLYN,
Attorney for Defendant.

59½ [Endorsed:] Supreme Court of Michigan. Commercial Milling Co. *vs.* Western Union Telegraph Co. Petition for Writ of Error. Filed May 27, 1908. Chas. C. Hopkins, Clerk. Corliss, Leete & Joslyn, Att'ys for Def't., Business Address, 1424-8 Ford B'ld'g, Detroit, Mich.

60 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Commercial Milling Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein the Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Claudius B. Grant, Chief Justice of the Supreme Court of the State of Michigan, this 27th day of May, in the year of our Lord one thousand nine hundred and eight.

[Seal of the Supreme Court of Michigan, Lansing.]

CLAUDIUS B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

60½ On this 11th day of June, in the year of our Lord one thousand nine hundred and eight, personally appeared Harold Collins before me, the subscriber, Kate F. Swan, a notary public in and for the County of Wayne, State of Michigan, and makes oath that he delivered a true copy of the within citation to Wilkinson & Younglove, attorneys for the Commercial Milling Company, defendant in error, by delivering the same to Lyle G. Younglove, a member of said firm and whom he found in charge of the office thereof.

HAROLD COLLINS.

Sworn to and subscribed the 11th day of June, A. D. 1908.

[Seal of Kate F. Swan, Notary Public, Wayne County, Mich.]

KATE F. SWAN,
Notary Public, Wayne County, Michigan.

My Commission Expires April 23, 1912.

61 *Bond.*

Know all men by these presents that we, Western Union Telegraph Company, a corporation organized and doing business under the laws of the State of New York as principal, and Charles D. Joslyn, as surety, are held and firmly bound unto the Commercial Milling Company, a corporation created and existing under the laws of the State of Michigan, in the full sum of Twenty-five hundred dollars ($2500.) to be paid to the said Commercial Milling Company, its successors or assigns; to which payment well and truly to be made we bind ourselves; our successors, heirs, administrators, executors, jointly and severally by these presents.

Sealed with our seals and dated this 27th day of May in the year of our Lord one thousand nine hundred and eight.

Whereas, lately, at a session of the Supreme Court of Michigan, in a suit pending in said Court between said Commercial Milling Company, plaintiff and said Western Union Telegraph Company, defendant, a judgment was rendered against said Telegraph Company, and said Company having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse the judgment in the aforesaid suit, and a citation to the said Commercial Milling Company citing it and admonishing it to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof;

Now the condition of the above obligation is such that, if the said Western Union Telegraph Company shall prosecute its said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and effect.

WESTERN UNION TELEGRAPH COMPANY,
By JOHN B. VAN EVERY, *Vice Pres't.*

A. R. BR-WER, *Secretary.*

[SEAL.] C. D. JOSLYN.

Signed and sealed in presence of

PAUL B. MOODY, as to C. D. Joslyn.

Approved

C. B. GRANT,
Chief Justice.

(Endorsed:) Filed May 27, 1908, Chas. C. Hopkins, Clerk.

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and ninety eight.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by
CLAUDIUS B. GRANT,
Chief Justice of the Supreme Court
of the State of Michigan.

67 To the Supreme Court of the United States:

The execution of the within writ appears by the transcript of record hereto attached.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

June 22, 1908.

68 Supreme Court of the State of Michigan.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
COMMERCIAL MILLING COMPANY, Defendant in Error.

STATE OF MICHIGAN, *ss:*

In the Supreme Court.

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the writ of error, the writ of error, with

allowance endorsed thereon, the citation with proof of service of a copy thereof upon the adverse party, a copy of the bond to the adverse party, duly approved, together with the assignments of error in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing, this twenty-second day of June in the year of our Lord one thousand nine hundred and eight.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 21,237. Michigan supreme court. Term No. 441. Western Union Telegraph Company, plaintiff in error, *vs.* Commercial Milling Company. Filed June 24th, 1908. File No. 21,237.

Supreme Court of the United States

OCTOBER TERM, 1908—441.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
COMMERCIAL MILLING COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The statement of the case by Mr. Justice Carpenter, found on page 23 of the record, may, perhaps, be sufficient for the general purposes of this case, but it seems to us that it may not be inappropriate to state the facts somewhat more in detail.

This is a suit to recover damages for the non-delivery of a message sent by the milling company from Detroit, Mich., to the Kaw Grain & Elevator Co. in Kansas City, Mo. The declaration contains three counts in special assumpsit upon an alleged contract by the plaintiff in error to transmit and deliver the message. The message was written upon a Postal telegraph blank and contained terms and conditions not stated in the declaration, some of which are as follows:

> "Send the following message without repeating subject to the terms and conditions printed on the back hereof, which are hereby agreed to."

This was signed by the milling company. Some of the terms and conditions referred to are as follows:

> "It is agreed between the sender of this message and the Postal Telegraph Company that the

said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any UNREPEATED message beyond the amount received for sending the same. Nor for mistakes or delays in the transmission or delivery or for non-delivery of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured."

There was a further provision in the contract that messages could be insured by contract in writing stating the agreed amount of risk and payment of premium thereon at the rate of one per cent for a distance up to one thousand miles and two per cent for a greater distance.

The facts are as follows:

On the 15th day of August, 1904, the defendant received the following telegram from the Kaw Grain & Elevator Co. of Kansas City, Missouri:

> "Offer ten thousand 2 hard dollar 1 if quick. That is what Chicago is paying us."

The defendant in error, by its president, Robert Henkel, wrote a message in reply on a Postal Telegraph blank containing the usual terms and conditions printed on the face and back thereof, including those above set forth, and delivered the same for transmission to the agent of the plaintiff in error in its Board of Trade office in Detroit. The reply message was as follows:

> "Accept your 2 hard dollar one ten thousand here."

The plain English of these two messages is that the elevator company offered the milling company ten thousant bushels of #2 hard wheat at $1.01 per bushel, which was accepted by the latter company, to be delivered in Detroit. It was shown by the telegraph company that the message was transmitted to Chicago, the first relay station on its way to Kansas City, at 12:55 P. M., about a minute after it was filed by the milling company (Record, p. 10). When the Detroit operator had finished sending, he received the "OK" of the Chicago Board of Trade operator, which indicated that the message had been received at the Chicago office. It was sent over a special wire running from the Detroit to

the Chicago Board of Trade with no stations between. This special wire is for the purpose of handling grain orders. There is no dispute, we think, about the prompt transmission of the telegram from Detroit to the relay station in Chicago and its receipt there, but it appears that the elevator company in Kansas City never received the message, so that, if negligence is to be inferred from the mere fact of non-delivery in Kansas City, that negligence did not occur within the State of Michigan.

At the close of the business day of the Board of Trade, the milling company, by its president, wrote a letter confirming the telegraphic contracts made during the day with the elevator company. This letter was received by the elevator company on August 17th and immediately wired the milling company as follows:

> "Pertinent have received no wire accepting offer ten thousand 2 hard."

"Pertinent" is a code word meaning "We have your letter of the 15th."

The president of the milling company was in Cleveland when the message was received, but in his absence another man had general charge of the business. No action was taken by the milling company with regard to this telegram until August 20th, when they purchased ten thousand bushels from another company without communicating in any way with the elevator company, or making any effort to ascertain whether that company would still carry out its offer, and no evidence was produced at the trial showing that it would not have done so on the 17th.

The message upon which suit is based is Exhibit 1. (See Record, p. 20.) Exhibit 17 following is another message sent by defendant the same day written on a Western Union telegraph blank having same terms.

The identical terms of this contract have been before the Supreme Court of Michigan several times and have been held reasonable and valid, but it is now contended that a statute of 1893 makes this contract void. The statute is as follows:

> "An Act to prescribe the duties of telegraph companies, incorporated either within or without this State, relative to the transmission of mes-

sages, and to provide for the recovery of damages for negligence in the performance of such duties.

Section 1. The People of the State of Michigan enact, That it shall be the duty of all telegraph companies incorporated either within or without this State, doing business within this State, to receive dispatches from and for other telegraph companies' lines, and from and for any individuals, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph companies, to transmit the same with impartiality and good faith. Such telegraph companies shall be liable for any mistakes, errors or delays in the transmission or delivery, or for the non-delivery of any repeated or non-repeated message, in damages to the amount which such person or persons may sustain by reason of mistakes, errors or delays in the transmission or delivery, due to negligence of such company, or for the non-delivery of any such dispatch, due to negligence of such telegraph company, or its agents, to be recovered with costs of suit by the person or persons sustaining such damage."

The questions presented are:

First. That the statute as construed violates the commerce clause of the Federal Constitution.

Second. It violates the Fourteenth Amendment to the Federal Constitution.

We give considerable attention to the character of the contract for transmission of the message because it has an important bearing on both of these questions.

If the terms and conditions are reasonable and beneficial to trade and commerce and not harmful to the public, as we think we shall show, then the statute cannot be justified on the ground that it is an aid to interstate commerce. Neither can it be held to be within legislative power to prohibit such a contract.

ARGUMENT.

There was an express contract made between the parties to this suit, the terms of which, if valid, would defeat any recovery by the milling company.

This court, as has the Supreme Court of Michigan, has said that the conditions imposed by this contract are reasonable and binding whether the sender's attention was directed to them or not.

Birkett vs. Western Union Tel. Co., 103 *Mich.* 361.

Primrose vs. Western Union Tel. Co., 154 *U. S.* 1.

The agents of the milling company were fully acquainted with the contract under which it requested the telegraph company to transmit the message. It is a contract which it had made probably thousands of times, a contract which this court has held to be reasonable, based on proper consideration, and in no way opposed to public policy. It is a contract, also, which we think the court will take judicial notice is entered into daily by thousands of people in this State to their own advantage as well as that of the telegraph company. For it will be noted that the company offers to the public an option. The sender may take his own chances of prompt delivery of an unrepeated message or may have it repeated and then the telegraph company takes the responsibility, or, if the message is vitally important, the sender may have the correct transmission and delivery insured. So that when the milling company offered its message to the telegraph company for transmission, three forms of contract were open to the choice of the milling company, depending upon the value which the milling company attached to its message, the amount of risk it desired the company to assume, and the amount of remuneration therefor which the company should receive. The milling company being willing to assume the risk, offered the telegraph company its message at the reduced rate of transmission, which was accepted by the company subject to the terms and conditions connected with that rate. The question which arises is—Is such a contract, mutually beneficial to the parties, valid?

That it would have been held valid by the Michigan Court but for the statute above referred to is obvious from its previous decisions. The trial court held that the statute by necessary implication prohibited such a contract, and the Supreme Court of Michigan, under a rule which affirms the decision of the lower court when the appellate court is evenly divided, affirmed this decision.

I.

The Michigan Statute so construed is in violation of the Commerce clause of the Federal Constitution.

It is not to be denied that each state has full power to regulate its own internal affairs, nor is there any question made here but that in the exercise of this power it may do many things which incidentally affect interstate commerce within its own boundaries, but this power to regulate is strictly limited to the boundaries of the State. It is obvious that in no other way could each exercise its full police power.

It will not be denied that, while Congress has not gone into detail in the regulation of interstate telegraphic commerce, it has the power to do so. With regard to the subjects committed to Congress, its police power is as full as that of the states over their internal affairs. As the exercise of the police power by the states and that by the Federal government approach each other, the line of distinction between the two powers necessarily becomes somewhat dim and shadowy and there has arisen in consequence some apparent confusion in the decisions, but we think there is much less want of harmony than is sometimes supposed and that the confusion is, perhaps, more apparent than real.

We think we may safely lay down the rule that, with regard to interstate commerce, states in the exercise of their police power may not directly interfere with it, but, in caring for the health, safety and welfare of the people within their boundaries, they may adopt legislation which incidentally affects interstate commerce. No principle has ever been laid down in any Federal case that we are aware of which gives the states

the slightest control over interstate commerce beyond their own boundaries. On the other hand, there are quite a number of cases which clearly and distinctly limit the police power of the state even with its own boundaries, and, in fact, the rule that states, "may not in the exercise of their police power directly interfere with interstate commerce" applies to state legislation and control within state boundaries. It is so obviously illogical to say that interstate commerce is under the direction of both state and Federal government, that an argument upon this question is not necesary. The state has no dominion whatever over interstate commerce as such.

So far as we can discover, there is but one case decided by this court where the facts are like those in this case. All the others which will be cited by the other side and which touch upon the relation of state police power to interstate commerce are decided upon grounds which do not affect the case at bar. The case to which we refer is

> *Western Union Tel. Co. vs. Pendleton*, 122 *U. S.* 347.

In that case the telegraph company had undertaken to transmit a message from Shelbyville, Indiana, to Ottumwa, Iowa. It did not deliver this message at Ottumwa as required by the statute of the State of Indiana. Suit was brought in Indiana and the Supreme Court of that state held the statute applicable and the telegraph company liable for the penalty therein imposed, but this court held the statute unconstitutional. The Indiana statute was as follows:

> "Every electric telegraph company with a line of wires fully or partly in this state and engaged in telegraphing for the public shall during the usual office hours receive dispatches, whether from other telegraph lines or from individuals, and on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they were received, under penalty in case of failure to transmit, or if postponed out of such order, of $100 to be recovered by the person whose dispatch is neglected or postponed. Provided, however, that ar-

rangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from officials of justice shall take precedence of all others."

Another provision of the statute was as follows:

"Such companies shall deliver all dispatches by messenger to the persons to whom the same is addressed, or to their agents, upon the payment of any charges due for same, provided such persons or agents reside within one mile of the telegraph station, or within the city or town within which such station is."

In deciding the case, this court, speaking through Mr. Justice Field, after referring to two other cases, viz: Pensacola Telegraph Co. vs. Western Union Tel. Co., 96 U. S. 1, and Telegraph Company vs. Texas, 105. U. S. 406, said:

"In these cases, the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries and among the states is affirmed whenever that body chooses to exert its power, and it is also held that the states can impose no impediment to the freedom of that commerce. In conformity with these views, the attempted regulation by Indiana of the mode in which messages sent by the telegraph companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce which is as much beyond the power of Indiana to interpose as the imposition of a tax by the State of Texas upon any message transmitted by a telegraph company within her limits to other states was beyond her power. Whatever authority the states may possess over the transmission and delivery of messages by telegraph companies within her limits, *it does not extend to the delivery of messages in other states.*

"The object of vesting the power to regulate commerce in Congress was to secure with reference to its subjects uniform regulations where such uniformity is practicable against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to telegraphic com-

> munications between citizens of different states if each state was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each state. Indiana, as seen by its law given above, has provided that communications for and from officers of justice shall take precedence and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order, but that all other messages shall be transmitted in the order in which they are received, and punishes as an offense a disregard of this rule. Her attempt by penal statutes to enforce a delivery of such messages in other states in conformity with this rule could hardly fail to lead to collision with other statutes. Other states might well direct that telegrams on other subjects should have precedence in delivery within their own limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in case of fire, or other calamity, and telegrams regarding the sickness or death of relatives."

We quote the foregoing from the opinion because it sets up in clear and unmistakable language the reason why one state may not undertake in any way to regulate interstate commerce or, for that matter, intra-state commerce in another state. We think the case of

> *Western Union Tel. Co. vs. Chiles*, 214 *U. S.* 274,

is in point. If we correctly interpret the opinion in that case it stops the effect and control of the State of Virginia over the transmission of telegraph messages at the point where another jurisdiction takes hold. This is all we contend for in the case at bar.

We cite also

> *Walling vs. Mich.*, 116 *U. S.* 455;
> *Wilton vs. Missouri*, 91 *U. S.* 275-282;
> *County of Mobile vs. Kimball*, 102 *U. S.* 691-697;
> *Brown vs. Houston*, 114 *U. S.* 622-631;
> *Wabash Ry. Co. vs. Illinois*, 118 *U. S.* 577.

The latter case suggests the notion that the State Supreme Court might easily have avoided the Federal question in this case by holding that the statute applies only to intra-state commerce.

It has been suggested and argued that the suit is based upon a Michigan contract and that its validity is to be determined by the laws of Michigan. The trouble with this suggestion is that it does not hold out or bring us any nearer the solution of the main question, because, *if the statute herein discussed is unconstitutional, it is no law; if it is no law, then the previous decisions of the state must govern, and the contract is therefore valid.* The power of the State of Michigan over contracts of this nature to be executed wholly within its own borders is one thing, but to attach to it police regulations calculated to affect the performance of the contract in another state is quite a different thing.

It has been said that the Michigan statute is not intended to and does not affect the right of the plaintiff in error to make contracts relating to the transmission of messages in other states; that it simply fixes the limitations upon contracts in this state, and that when the contract is once made, no matter what its written terms are, its scope in operation is fixed by the statute. If this reasoning were sound, then it simply provides an indirect method of avoiding the commerce clause of the Federal constitution. It is manifest that, when the telegraph company made a contract to transmit a message from Detroit to Kansas City for fifty cents, it undertook an obligation to transmit it through several states. It was not a separate but an indivisible contract. It inevitably follows that the Michigan statute as it has been construed puts a limitation and restraint upon the power and right of the telegraph company to transmit messages through other states, and this is precisely what the State of Michigan cannot do.

It was argued in the Michigan courts that there is a distinction between the Indiana statute passed upon in the Pendleton case and the one under consideration, in that the Indiana statute provided a *penalty* while the Michigan statute merely provides for a *liability.* This, we think, is not a practical distinction, and we desire to refer to the case of Huntington vs. Attril, 146 U. S. 657, which was cited by the other side in the court be-

low. The question involved in that case was whether under the Federal constitution a Maryland court was justified in refusing to enforce a judgment of the New York courts, and the test was whether the New York judgment was based on a penal or criminal law. We take the liberty of quoting a few sentences from the opinion:

> "Penal laws strictly and properly are those imposing a punishment for an offense committed against the state and which by the English and American constitution the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> * * * * * *
>
> "The question whether a statute of one state which in some aspects may be called penal is a penal law in the Congressional sense, so that it cannot be enforced in the courts of another State, depend upon the question whether its purpose is to punish an offense against the public justice of the State or to afford a private remedy to a person injured by the wrongful act."

There can be little question but that the Indiana statute passed upon in the Pendleton case simply provided a civil remedy, to the party aggrieved, for the legal wrong resulting from the negligence of a telegraph company, and that is all that can be said of the Michigan statute. Their scope and effect are therefore for the purpose of this discussion the same. Moreover, *the Indiana statute was held to be void because it undertook to regulate the business in another state and not because it was a penal statute.* The Michigan statute can only be effective as to interstate commerce by controlling to a greater or less degree the acts and business of the telegraph company in another state. It is one mode of regulating the transmission and delivery of messages and we submit it must be confined to the domestic commerce within the State of Michigan. Without this limitation its effect would be the same as that of the Indiana statute.

In all the previous arguments of this case, our attention has been called to several cases which we now examine. The principal reliance of the plaintiff below was upon the case of

Western Union Tel. Co. vs. James, 162 *U. S.* 650.

As we understand that case, and others to which we are referred, this court has in every instance been careful to confine the effect and operation of a state statute to the territory of the state.

The James case was a suit brought by James against the telegraph company to recover the amount of a penalty provided by a Georgia statute, which, it was alleged, the company had incurred, and also to recover other damages by reason of the failure of the company to promptly deliver a telegram coming from another state to the plaintiff at his residence in the State of Georgia. The Georgia statute provided a penalty of one hundred dollars, to be recovered by the party claiming damages for failure of the telegraph company to transmit and deliver messages with impartiality and good faith and with due diligence.

This was undoubtedly an interstate message, and the defense was that the statute of Georgia could have no application to it. This court, speaking through Mr. Justice Peckham, sustained the statute and recognized the right of the State of Georgia to regulate the delivery of the message, after its arrival therein at the place of delivery, *within its own borders*—subject, however, to the very important qualification:

> *"At least so far as legislation of the State tends to enforce the performance of duty owed by the company under the general law."*
> 162 *U. S., at p.* 661.

The James case does not stand for the proposition that the State may, even within its own borders, impede or obstruct interstate commerce, or prohibit any kind of interstate commerce which Congress by express enactment or impliedly by failure to act has seen fit to permit. Mr. Justice Peckham, in delivering his opinion, said:

> "It is seen from this reasoning that the foundation for holding the act void was that it necessarily affected the conduct of the carrier, and

regulated him in the performance of his duties outside and beyond the limits of the state enacting the law. A provision for the delivery of telegraphic messages arriving at a *station within the state* is not of the same nature as that statute, and would have no effect upon the conduct of the telegraph company with reference to the performance of its duties outside of the state."

The Court then draws the distinction between the James case and that of Western Union Tel. Co. vs. Pendleton, 122 U. S. 347, and says:

"No attempt is here made to enforce the provisions of the state statute beyond the limits of the state, and *no other state could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the State of Georgia.* No confusion, therefore, could be expected in carrying out within the limits of that state the provisions of the statute. * * * *It is not a regulation of commerce,* but a provision which only incidentally affects it. We do not mean to be understood as holding that any state law on this subject would be valid even in the absence of Congressional legislation. If the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce, our decision in this case would form no precedent for holding valid such legislation."

Again the Court said:

"But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with *regard to the performance of its duties in other states.*"

Mr. Justice Peckham further said:

"Again it is said that this company entered into a valid contract in Alabama with the sender of the message which provided that it would not be liable for mistakes in its transmission beyond the sum received for sending the message unless the sender ordered it to be repeated and paid half the sum in addition, and this statute changed the lia-

bility of the company as it would otherwise exist. * * * *This, however, is not an action by a person who sent the message from Alabama, and this plaintiff is not concerned with that contract, whatever it was.* There was no mistake in the transmission of the message, and there was no breach of the agreement. The action here is not founded upon any agreement, and the judgment neither affects nor violates the contract mentioned."

Another case cited by counsel is

Pennsylvania Ry. vs. Hughes, 191 *U. S.* 477.

Suit was brought in the courts of Pennsylvania for the recovery of damages to a horse shipped from a point in the State of New York to a point in the State of Pennsylvania. The shipment was made under a bill of lading which limited the carrier's liability, which limitation was valid according to the common law as construed by the courts of New York, but was invalid by the common law as construed by the courts of Pennsylvania. The Supreme Court of Pennsylvania adhered to its own construction of the common law and held that within that state the limitation was invalid. In this court the carrier contended that this decision was erroneous upon two grounds: first, because the validity of the contract was determined by the laws of the State of New York where it was made, and not by the laws of Pennsylvania; second, that the judgment of the Supreme Court of Pennsylvania was erroneous because it was in conflict with the Interstate Commerce Act passed by Congress. This court held that there was in this act no "regulation of the matter in controversy" and that the case was ruled by

Chicago & Milwaukee Ry. Co. vs. Solan, 169 *U. S.,* 133.

In the latter case suit was brought in the courts of Iowa to recover damages for injuries sustained in that State through the negligence of a railroad company while transporting the plaintiff below and cattle in his charge from Rock Valley, Iowa, to Chicago, Illinois. The plaintiff below had signed a contract limiting the liability of the carrier for any injury to the person in charge of said stock to five hundred dollars. This contract was

held void by the Supreme Court of Iowa because it was prohibited by statute. This court affirmed the judgment. It said, among other things:

> "A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the law of the State for acts of nonfeasance or of misfeasance *committed within its limits.* If he fails to deliver the goods to the proper consignee at the right time or place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. * * *
>
> "The rules prescribed for the construction of railways for their management and operation designed to protect persons and property otherwise endangered by their use are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon this particular subject they are to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations *within its limits.* * * * The statute now in question, so far as it concerns the liability for injuries *happening within the State of Iowa*—which is the only matter presented for decision in this case—clearly comes within the same principles."

If the suit in the case at bar had been for damages resulting from negligence of a telegraph company in the State of Michigan, the rule laid down in the foregoing quotation would govern. The distinction between the Hughes and Solan cases and the case at bar is quite plain. In those cases it was simply attempted to enforce the laws of the State within its own borders, while in the case at bar an attempt is made to give the effect of a State statute beyond he borders of the State.

It will not be denied that the statute in this case, as construed by the Supreme Court of Michigan, is a regulation of interstate commerce. Prima facie, therefore,

it is invalid. If it is to be supported at all, it is to be supported under the doctrine of Western Union Tel. Co. vs. James (supra), which is that a State statute may, without being unconstitutional, indirectly affect interstate commerce, provided (1) its effect is limited to the borders of the State, and (2) it imposes no new burden or obstruction, but simply "tends to enforce the performance of duty owed by the company under the general law" (162 U. S., page 661).

Can this statute be supported under that doctrine?

Is there any attempt to confine its operation to the borders of the State?

Instead of tending simply to enforce the performance of duty owed by the company under the general law, is it not enacted for the very purpose of increasing the measure of that duty and of compelling the company to do a thing which, by the general law, it cannot be compelled to do; namely, to accept interstate messages for transmission without the reasonable limitation of liability which the general law permits?

To put it in a slightly different way: the telegraph company says to the people of the State of Michigan that it is prepared to handle messages for transmission to other States *on these terms, and on these terms only.* By the general law these terms are reasonable. This court has held so, and Congress, by its inaction, has ratified and approved the holding and by implication has consented that the company conduct interstate commerce on these terms. The people of the State of Michigan, by the act of their legislature, as construed by their highest court, have now said to this plaintiff in error that it shall not contract, within the State, on terms which this court and Congress have deemed to be *reasonable and on which alone this plaintiff in error is prepared to engage in such interstate business.* The statute, therefore, thus construed, either prohibits the plaintiff in error from engaging in this kind of interstate commerce at all, or compels it, against its wish, to engage in such commerce on new and different terms, at a greater expense and risk.

In neither case can the statute be said to be confined in its scope to the enforcement of the performance of

duty owed by the company under the general law; in both cases it is a direct discouragement, obstruction and impediment to interstate commerce which Congress has seen fit to permit; and it cannot be supported under the exceptional doctrine of W. U. vs. James, but it is undoubtedly within the general principle announced in W. U. vs. Pendleton (*supra*).

II.

The statute, as construed, violates the Fourteenth Amendment of the Federal Constitution, and is void.

(a)

The statute abridges privileges and immunities of citizens of the United States and deprives plaintiff in error and the persons with whom it does business of their liberty and property without due process of law.

The exact extent of the police power of a State over the right of contract cannot be defined, but that there is a limit somewhere no one will deny. This much, at least, may be stated with certainty: that its exercise must be for some public good and must be reasonable.

The question here is the same as presented in Lochner vs. New York, 198 U. S. 45, 56, i. e., "Is this a fair, reasonable and proper exercise of the police power of the state or is it an *unreasonable, unnecessary and arbitrary interference,*" with the liberty of free contract. The reasoning of Lochner vs. New York and the cases therein cited is fully applicable to this case and we think the same result must be arrived at, i. e., that the attempt to prohibit the contract made here is not a proper exercise of the police power and is void.

This court having held that contracts of this nature *are reasonable and in no way opposed to public policy* (Primrose vs. Western Union Tel. Co., 154 U. S. 1), and such having always been the recognized law of the State of Michigan prior to the statute (Birkett vs. Western Union Tel. Co., 103 Mich. 361), it seems clear to us that an attempted prohibition of such a contract by the legislature would be *unreasonable* and beyond its power.

It may not be amiss again to refer to the nature of the contract which the State seeks to prohibit. Telegraph companies are doing business affected with a public interest, and therefore must receive and transmit all proper messages offered if paid for. It makes no difference whether the message involves a possible risk of ten cents, ten million dollars or nothing. But the public, on the other hand, is not at a disadvantage—as it sometimes is in dealing with a common carrier—when dealing with a telegraph company offering terms and conditions like those under discussion. That is to say, no one is compelled by his necessities to send an unrepeated message or none at all. It is a matter of choice of modes of service. The sender, by choosing to send an unrepeated message, thereby implies that it is not of sufficient importance to him to have it repeated or insured—that the possible damages in case of failure in transmission or delivery are nominal only, not exceeding the amount paid for sending the message. An unrepeated message requires less labor on the part of the company, less use of its wires and instruments, and less expenditure generally; consequently it is enabled to charge correspondingly less for that kind of service. The commercial world knows and understands this and takes advantage of it. It knows from experience that the chances of an unrepeated message going astray or being wrongly written in transmission are small, and it is therefore quite willing to take that small risk and thus lessen its daily expenses to its own distinct advantage. It does with the telegraph service just as it does with the postal service. Now and then a registered letter is sent by mail, but the great bulk of letters, containing checks and correspondence of the highest importance, are mailed in the ordinary way without thought of registration. Why? Simply because comparatively few letters go astray, and as a business proposition it is regarded as quite safe to use the cheaper method of transmission by mail. It is purely a matter of business economy. It is precisely the same with the use of the telegraph. The common experience of the commercial business world is that the cheaper mode of telegraphing is safe enough for all ordinary purposes, and it therefore avails itself of the offered economy. Having an opportunity to choose a more expensive method, which insures greater accuracy, it chooses the cheaper method, and deliberately contracts for it. Can any man in reason say that such a contract is against public policy?

Is it not certain that, if telegraph companies are held to the same liability for an unrepeated message as for a repeated or an insured message, the practical result is necessarily to eliminate the cheaper method and make the telegraph business more costly to the public? It seems to us that the court cannot shut its eyes to the important fact that the principal business of telegraph companies is the transmission of commercial and business messages; and the further fact that the great proportion of these messages is unrepeated and sent at the lower price is conclusive evidence that the commercial world is financially benefited thereby.

All that is said in case of Primrose vs. Western Union Tel. Co., 154 U. S. 1, and the cases therein cited, including the Michigan case of Western Union Tel. Co. vs. Carew, 15 Mich. 525, showing that such contracts as this "must be considered as highly reasonable" and the reasons therefor is as applicable today as when written.

The effect of the statute as construed is to say to the telegraph company, "You must accept all messages whatsoever, whether the possible risk is certain or uncertain, whether the possible damages in case of loss are nominal or enormous, and in case of failure to transmit or deliver, you must pay all damages whatsoever, whether contemplated or not at the time the contract was made; and it shall be unlawful for you to enter into any contract with the sender of a message whereby you shall be notified of the importance of the message and have the amount of possible loss in case of failure determined beforehand, and your compensation based upon the risk so assumed." Such statute is clearly oppressive. As was said by this court in Primrose vs. Western Union Tel. Co., even a common carrier of goods may by special contract restrict the sum for which he may be liable, even in case of loss by the carrier's negligence, and as there quoted from Hart vs. Pennsylvania Railroad, 112 U. S. 331, 343, "The contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives and of protecting himself against extravagant and fanciful valuation." We have spoken of the postal service. Is it conceivable that the United States would consent to be liable for any loss caused by the negligence of the postal service in relation to unregistered matter or in the case of registered matter beyond a fixed and known limitation?

"But telegraph companies are not bailees, in any sense. They are entrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of damages for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company."

A telegraph company has no means of knowing the consequence of a failure to transmit or deliver a message; the sender has. It would certainly be unreasonable to say that a telegraph company must accept a message involving a million dollar risk, to be transmitted and handled as an unrepeated message, without the limitation of liability which has been uniformly considered reasonable and to which the sender is perfectly willing to assent. Any attempt to make the telegraph company liable, irrespective of the notice to it of the value of the message and the amount paid for the transmission of the same, would be unreasonable, arbitrary and unjust. It would be an unwarranted interference with the rights, not only of the telegraph companies, but of all the persons with whom they do business, and thereby a violation of the Fourteenth Amendment to the Federal Constitution.

(b)

The statute denies to plaintiff in error and the persons with whom it does business the equal protection of the laws.

It is the law of Michigan that express companies may by contract limit their liabili.y.

Smith vs. American Express Co., 108 *Mich.*, 572, 578(3).

It is also the law of Michigan that *other common carriers* may by contract limit their liability.

Mich. Central Ry. vs. Hale, 6 Mich., 243.

In that case the question arose as to the right of a shipper and a common carrier to enter into contracts limiting the liability of the carrier. The subject was discussed at great length by Chief Justice Martin, who held that while the carrier cannot limit its own liability, it had the right to enter into contracts for such limitation. He said:

> "What principle of public policy superior to that which secures to every citizen the right to control his own affairs is contravened or what law is violated by him in making this contract? He renounced the benefit of a liability which the law authorizes him to insist upon; and by this renunciation, which is voluntary and can never be compulsory, the carrier is relieved from such liability. This is the result of his act and volition as much as of the carrier, and, if we hold that he cannot do this because of the benefit to the carrier accruing from it, we must deny to all who have property to transport, if sent forward by carrier, the ordinary rights of choice and power to contract which belongs to every man in every other instance. *Such doctrines we think to be an unwarranted restriction upon trade and commerce and a most palpable invasion of personal rights.* Quoting Dorr vs. N. J. Steam Navigation Co., 1 Kern, 493.

The general railroad law of 1855 contains this clause: "No railroad corporation created in this State shall be suffered to lessen or directly or indirectly abridge their common law liability as such common carriers." Of this statute Mr. Justice Cooley said in McMillan vs. M. S. & N. Ry. Co., 16 Mich., beg. at page 109:

> "The companies are forbidden to lessen or in any way abridge their liabilities as common carriers, but the person sending goods by them is not forbidden to release them from such liabilities, or from any portion thereof, for any consideration which to him is satisfactory. In other words, the law compels these companies at all times, at the

> option of those sending goods by them, to carry goods as insurers. If, on the other hand, the carriers can make it for the interest of the party to relieve them from this liability, wholly or in part, a contract to that effect, if fairly made and imports no unreasonable conditions, is not opposed to public policy, and to forbid it would seem an unnecessary restraint upon freedom of action."

It thus appears that contracts of this nature generally are not, in Michigan, void as against public policy. Express companies, railroad companies, telephone companies and telegraph companies are all of the same nature in that they are quasi public utilities. Telegraph companies in this State are not common carriers, and it has been recognized both by this Court and by the Supreme Court of Michigan that public policy requires of them not a greater but a lesser liability than in the case of common carriers.

We apprehend that the underlying principle of the doctrine announced in Hadley vs. Baxendale, 9 Exch. 345, is that in all business transactions it is not only desirable but necessary that the parties should be able to know with some *definiteness and certainty* the extent and character of liability they are about to assume. This principle has been universally recognized by the courts and in all the dealings of the business world, and if courts will protect parties on that basis after breach without express provision in the contract, how much more should they do so when the parties themselves have consciously and on reasonable terms set out to provide such certainty in the contract itself.

If it be possible that any exceptions exist or if any legitimate ground can be conceived for denying to any class or classes of persons the right to ascertain beforehand what risks are being undertaken by them, yet we submit there is no principle of classification whereby a legislature may properly single out telegraph companies and forbid them and their customers from making contracts which all other quasi public utilities, including common carriers, are permitted to make.

We feel that the opinion of Mr. Justice Carpenter, beginning on page 23 of the record, is in reality a much better brief than we can present, and we take the liberty

of asking that it may be considered as a part of our brief.

C. D. JOSLYN,
Attorney for Plaintiff in Error.

GEORGE H. FEARONS,
HENRY D. ESTABROOK,
Of Counsel.

Supreme Court of the United States

(October Term, 1907)

No. 7

Western Union Telegraph Company,
Plaintiff in Error,
vs.
Commercial Mining Company,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

Submitted by

Robert D. Williamson,
Attorney for Defendant in Error.

Butler Printing Co., Fine Press Work, 27 and 29 Lafayette Ave.
1907

Supreme Court of the United States

(October Term, 1908.)

No. 441.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
COMMERCIAL MILLING COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT AND APPELLEE.

STATEMENT OF FACTS.

In the statement of facts contained in the brief for appellant, we beg leave to make the following corrections; Mr. Henkel, who was on August 17, 1904, secretary and treasurer of the Commercial Milling Co., was on that date absent from the city, leaving no one in charge but the bookkeeper. On his return, about the 20th, he purchased wheat to make up for that ordered by the telegram (Exhibit 1) from the people he did, because it was cheaper than buying it from the Kaw Grain & Elevator Co. The question of the price of grain on the 17th of August was left to the jury and they found a verdict of $900.00 and interest in favor of plaintiff. As to the claim that conditions in the identical terms of those on the back of the telegram, which is the basis of this suit, have been held reasonable and valid by the Supreme Court of Michigan, we shall have more to say in the argument.

The Supreme Court of Michigan has not decided any case involving a claim for damages against a telegraph company for negligence accruing since the passage of the statute set forth in plaintiff in error's statement of facts, nor have they decided in favor of a telegraph company in cases involving the non-delivery of a telegram, and the case at bar is the first case to be brought under the terms of the statute of Michigan in question, which is found in the Compiled Laws of Michigan for 1897 in Section 5628. The trial court found that the statute in question prohibited a telegraph company from restricting its liability by special agreements or stipulations such as were placed upon the telegraph blank, "Exhibit I", which decision was affirmed by an equally divided Supreme Court.

ARGUMENT.

Before proceeding to an answer of the brief presented by counsel for plaintiff in error, it would not seem amiss to consider several propositions which form the basis of the legal questions involved in the decision of this suit. The first of these preliminary questions is that of the contract between the parties hereto.

THE CONTRACT.

The contract in this case as referred to by us is the contract between the Commercial Milling Co. and the Western Union Telegraph Co., whereby the telegraph company undertook to transmit to Kansas City, Mo., telegram Exhibit 1.

The question involved is the question of the right of a telegraph company to restrict its liability by means of conditions similar to those printed upon the back of the telegram (Exhibit 1). This question will be first considered without reference to the Statute of Michigan or to the Constitution of the United States.

From the origin of telegraphy to the present there has been a continued discussion in the several states as to whether or not a telegraph company has the right to compel its patrons to agree to the conditions on the back of the telegraph blank, which it seeks to couple with every contract or message. In the early days of teleg-

raphy, in view of the practically unknown force which the telegraph company used in the transmission of their messages and of the fact that the art of telegraphy was in its infancy, the courts were disposed to look with some favor upon the right of the telegraph companies to limit their liability; but with the improvement in the apparatus and the increase of knowledge of electricity, the courts in the several states have been reversing their former decisions and tend more and more to hold that telegraph companies, like common carriers, cannot contract against liability for their own negligence. In this connection we beg leave to call the Court's attention to Gray on Telegraphy, Section 48, which says:

> "Now, the Telegraph Co. is in the exercise of a public calling and is, *ipso facto*, under obligation to serve those who wish to employ it fairly and reasonably. No power which gives a telegraph company the right to evade that obligation is consistent with public policy. The power to contract against liability for negligence is a power to evade that obligation. It is a power to treat the public unfairly and unreasonably, simply because it is a power to compel all those who wish to employ the company to exonerate it from liability for negligence. A few strong corporations control the whole business of communicating intelligence by telegraphy. In the absence of judicial or legislative intervention, these corporations can, through the vast importance of their purposes, to the public, dictate at will the terms of their employment. If they should be permitted to contract against liability for negligence they could raise their rates for communicating messages with full liability for a failure to exercise due skill and care to an unreasonable height,—to such a height as to practically debar the public from contracting for that skill and care. They not only could but would take this course. They would be induced to do it by desire to swell their revenues through exonerating themselves from losses occasioned by neglect; they would not be deterred from taking it by fear of losing custom, since, owing to the importance of their purposes, that fear is practically groundless. The course that telegraph companies assume to take at the present date confirms this statement. They offer to contract according, and according only, to certain terms and regulations. They do not even offer in those terms to make an ordinary

contract of a telegraph company. They do not offer to assume, under any circumstances, full legal liability for neglect. *They offer to contract only upon a practically complete exoneration from that liability. The power to contract against liability for neglect then is a power to practically compel all those who wish to employ the company, to exonerate it from that liability,—a power to treat the public unfairly and unreasonably. As such, it is inconsistent with public policy.*"

In the case of the Western Union Telegraph Co. vs. Graham, 1 Col., 230, which was an action for failure to deliver a message, and the defense the written stipulation on the back of the telegram, the Court says:

"Much has been said about the peculiar hazards to which the telegraph companies are exposed. It is said that 'the operating apparatus of the telegraph leaves no record of the work done at the place from which it is transmitted, and that, therefore, there is a peculiar liability to error in the non-transmission and transmission of despatches.' This is all true, of course, and legislatures have been liberal in allowing companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. *To permit them to contract against their own negligence would be to arm them with a most dangerous power, one, indeed, that would leave the public almost entirely remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service.* They do not select their agents, or employes, nor can they remove them. They are bound to take the company as they find it and to commit to its agents their messages, however valuable they may be. Such being the case, public policy as well as commercial necessity, requires that companies engaged in telegraphy should be held to a high degree of responsibility."

In Smith vs. Western Union Telegraph Co., 83 Ky., 112, the Court says:

"It is, however, a public agent; it exercises a quasi public employment, carefulness and fidelity are essentials to its character as a public servant,

> *and public policy forbids that it should abdicate as to the public by a contract with an individual; he is one of a million, his business will perhaps not admit of delay or contest in the courts, and he is ex-necessitate, compelled to submit to any terms which the company might see fit to impose;* but the law should not uphold a contract under which a public agent seeks to shelter itself from the consequences of its own wrong and negligence. Its liability for neglect is not founded purely upon contract. It is chartered for public purposes; extraordinary powers are therefore conferred upon it; it has the power of eminent domain; if it did not serve the public, it could not constitutionally lay a wire through a man's land without his consent; and by reason of the gift of these privileges, it is required to receive and transmit messages and is liable for neglect independent of any express contract."

See also Sutherland on Damages, 3rd Ed., Sec. 958, which says:

> "The practice very generally prevails of requiring messages to be written on blanks furnished by the company, on which are printed terms and conditions of such nature that the message-sender not only assents to an exemption from damages because of errors or delays in the transmission of unrepeated messages, but also from delay in the delivery or the non-delivery of any such message. *The repetition of a message has no legitimate effect to induce or to expedite its delivery;* but it is true that the repetition will convey a warning that the message is deemed important, and implies that the company has received, or on delivery will receive, additional compensation. It is clear that if such a stipulation, assented to, is sustained as having the force of a condition or contract, the company is under no obligation to deliver any unrepeated message. *For this reason such stipulations, exacted and assented to, are generally treated as unreasonable and void.* They are sustained, however, in Massachusetts."

Citations of like import to the foregoing could be made from every State in the Union except Massachusetts and Michigan.

The cases in Massachusetts which give effect to the stipulation on the reverse side of the telegraph blank, relieving a telegraph company from liability, were all decided under a former law of Massachusetts, which merely required telegraph companies to send messages according to their own rules and regulations, and which had the effect of limiting the duties which could be required of them. That statute has, since the decision of these cases, been repealed, and a new statute enacted upon which no decisions have so far been rendered; so that Michigan stands isolated among the states in upholding, in the absence of a controlling statute, the right of a telegraph company to limit its liability so as to be irresponsible for its own negligence. Even the Michigan cases are *none of them cases brought for the failure to deliver a telegram;* and this is a fact of the utmost importance in view of the language in the case of Thompson vs. Telegraph Co., 107 N. C., 449, where it is held *that the stipulation on the company's blanks restricting liability for non-repeated message is unreasonable and void where the complaint is not of a mistake in the message, but for delay or failure to deliver; and the court proceeds further to enunciate the following doctrine:*

> *"The more recent cases founded upon the more thorough investigation and thought given to the subject are to the effect that any stipulation restricting the liability of the telegraph company for negligence even as to mistakes in transmission is void."*

In addition to this, the Michigan Supreme Court in deciding later cases, has evidently doubted the correctness and wisdom of the conclusions reached in the Carew case, which was decided some forty (40) years ago when telegraphy was in its infancy; but until the present case that court has not seen fit to break away from the established precedent even though faulty. Mark the language of the opinion in the case of Birkett vs. Western Union, 103 Mich., 361 (364):

> "Whatever might be the view of any of us, if it were a new question we are not disposed to overrule that case which received the sanction of the three eminent jurists who decided it."

In both the Carew case and the Birkett case, which are the two main cases in Michigan, the decisions are based directly upon the proposition that the Legislature

had imposed no liability upon telegraph companies, the Court in the Birkett case saying:

> "The Legislature has not seen fit to change the liability of the telegraph company as there established."

In deciding the Birkett case the Michigan Supreme Court relied in its opinion upon a number of citations. Certain of these were Massachusetts cases which, as we have shown are not analogous, as they were decided under the peculiar statute of Massachusetts then in force and since repealed. The remaining cases cited on page 364, we will briefly consider.

The Gildersleve case decided in Maryland was under a statute of Maryland similar in terms to the Massachusetts statute above referred to, providing that a company should receive messages and transmit them according to its own rules and regulations.

The Lassiter case in North Carolina was directly overruled by the Supreme Court of that State in Brown vs. Postal Tel. Co., reported in 17 L. R. A., 648.

The Wann (Missouri) case has been directly overruled by the Supreme Court of that State in the case of Reed vs. W. U. T. Co., 135 Mo., 674.

The Hart case (California) has been distinguished and criticised by the Circuit Court of Appeals of the United States in the Cook case, 9 C. C. A., 680, a case from that State.

The Passmore case was decided under the law of Pennsylvania, which draws a distinction between gross negligence and ordinary negligence, which distinction does not obtain in Michigan; but in that State it was held in the case of the U. S. Tel. Co. vs. Wenger, 55 Pa. St., 262, where a message was sent from a point in Pennsylvania to New York, and it appeared that the message got no farther than Philadelphia, that such failure to deliver the message was a clear case of gross negligence of the company in performing its undertaking, and the company was therefore held liable.

The Kiley case was decided in New York, where the courts have adopted the policy that common carriers may contract to relieve themselves from liability, and where the courts have adopted the doctrine of negligence and

gross negligence; but even in that State it has been held that such a limitation does not allow either a carrier or a telegraph company to contract against liability for its own negligence. See Sternwig vs. Erie R. R. Co., 43 N. Y., 123; Marquis vs. Wood, 61 N. Y. Sup., 251; also Dixon vs. W. U. Tel. Co., 3 App. Div., 60.

The Hearne case, decided by the court of Texas, simply holds that a company is not liable unless it be shown by direct testimony or by the facts and circumstances of the case that the error was caused by want of due care. But the doctrine is also laid down in the same State in the case of W. U. Tel Co. vs. Bertram et al., 1 Court App. C. C., Sec. 1152, "that it is now a general and accepted rule that where it is shown that the message was received by the company and not delivered or delivered in a materially altered or changed condition, a prima facie case of negligence is made against the company, and the burden is upon it to show that failure was result of unavoidable causes."

The case of West vs. Nagle, 32 S. W. (Texas), 707, holds that the failure to deliver is not excused by the stipulation contained on the back of the telegram, and that the company cannot contract against liability for its own negligence.

The Becker case is not now law in Nebraska, as will be seen from later Nebraska cases, particularly the Beals case, 56 Neb., 415.

So that, of the cases cited by the Michigan Supreme Court in support of its decision in the Birkett case, on page 364 of the opinion, four were dependent upon the peculiar wording of the statute, which has since been repealed; another was dependent upon the peculiar wording of the statute allowing companies to receive and transmit messages according to its own rules and regulations; three have been overruled by the Supreme Courts of their respective States; two depend upon the doctrine of negligence and gross negligence, which does not apply in Michigan; one (i. e. the Texas case) has been rendered of little avail by the decision in the Nagel case, which itself holds that if it is shown that an error was caused by want of due care, the company is liable (and the decisions in that State hold that failure to deliver is want of care); and the remaining case (the Hart case

in California) has been criticised by the U. S. Circuit Court of Appeals in a case from that State, and does not warrant the holding that a company may contract against liability for its own negligence. It therefore appears that there is not a single one of the cases cited by the court in support of its decision in the Birkett case, which, in the State in which it was rendered, would, at the present time, relieve the telegraph company from damages by reason of the failure to deliver a message.

We have gone to some length in discussing these cases for the reason that many of them were cited by this court in the opinion of the case of Primrose vs. W. U. Tel. Co., 154 U. S., 1.

The question of the fairness of the stipulation requiring a repetition of a message we think has been sufficiently dwelt upon in the foregoing cases and needs no further discussion. In the case at bar, however, we fail to see how a repetition of the message could have had any material effect. The message was wired to Chicago and an "O. K." sent back, and a repetition from Chicago would have been the only one received at the Detroit office; but at Chicago, after the O. K. had been sent, the message seems to have disappeared. As counsel for plaintiff in error stated in his argument in the court below, it may have dropped on the floor or blown out of the window.

The contract in the case at bar is a Michigan contract. It must therefore be presumed to have been made in contemplation of the laws of that State as existing at the time the contract was entered into, and in the light of those laws it is to be construed and its effect determined. It is therefore to be passed upon in the light of the Michigan statute (Michigan Compiled Laws, Sec. 5268), which, recognizing their common law liability, provides that telegraph companies cannot contract against liability for their own negligence; in effect, that they cannot by a contract practically forced upon their patrons, evade the liability which at common law attaches to their negligent performance of a legal duty.

Holding the contract to be a Michigan contract, and subject to the laws of that State, entails, in fact, no hardship upon defendant herein in regard to this message for the reason that under the common law of the

State wherein the negligence occurred, viz., Illinois, the telegraph company could not contract against its own negligence. See Webbe vs. Western Union, 169 Ill., 610, and the same rule of law is in effect in Missouri, the State in which the destination of the telegram was located. See Reed vs. Western Union, 135 Mo., 661.

THE STATUTE.

Waiving for the present the validity of the Michigan statute under the Constitution of the U. S., the fact that in part the contract is to be performed outside of Michigan has not bearing upon the liability of the defendant, for that statute is a remedial and not a penal statute. It is not directly penal for the reason that it merely restricts a right of contract. It is not indirectly penal for the reason that in its effect it allows only actual damages.

In Boice vs. Gibbons, 8 N. J. Law, 330, the Court says:

> "A statute which gives a remedy for an injury against him by whom it is committed to the person injured, and to him alone, and limits the recovery to the mere amount of the loss sustained, belongs to the class of remedial statutes."

See also:

Mansfield vs. Ward, 16 *Me.,* 433.

Since it is not a penal statute, its force and effect, if it is a valid statute, are not limited, as in the case of a penal statute, to the confines of its own State. In this regard it differs from the statutes under discussion in the case of the Western Union Telegraph Co. vs. Pendleton, 122 U. S., 347, and Western Union Telegraph Co. vs. Chiles, 214 U. S., 247, both of which are penal statutes whose force and effect is necessarily limited to the States of their origin.

See also:

Taylor-Farr Co. vs. Western Union, 95 *Ia.,* 740.

This brings us at once to the question of the validity or invalidity of the statute in controversy; for if the statute is absolutely invalid, it is no part of the law of the State.

Unless the almost unanimous array of authorities denying the right of a telegraph company to contract against liability for its own negligence is to be brushed aside as not truly declaratory of the common law, then it would appear that the only effect of the Michigan statute is to bring the law of that State into harmony with the common law of the other States of the Union. Under these circumstances it would seem to be anomalous to recognize the authority of those decisions as determining the law of their respective States and this in a controversy respecting the effect of the constitution of the United States upon the local law, and at the same time to hold the Michigan statute obnoxious to the Constitution.

There can be no question as to the validity of the Michigan statute regulating telegraph companies unless it conflicts with the constitution of the United States, either, first, as regards the clause giving to Congress the right to regulate commerce among the States or second, as regards the clause prohibiting the States from passing laws impairing the obligation of contracts, or section one (1) of the fourteenth amendment, prohibiting the States from passing laws abridging the privileges or immunities of citizens or denying to any citizen the equal protection of the laws.

This naturally brings us first to the discussion of Interstate Commerce and of the question in what respect such commerce is controlled by Congress under the Constitution of the United States, and to what extent regulations incidentally affecting it may be enforced by the several States.

INTERSTATE COMMERCE

The powers of Congress and of the general government in relation to interstate commerce are powers given them by the several States at the time of the adoption of the Constitution, and this is the only source of the power vested in Congress. While the Constitution vests in Congress the right to regulate commerce between the several States, yet, as has been said in the case of Pa. R. R. vs. Hughes, 191 U. S., 479:

> "The principle is recognized that, in the absence of Congressional legislation upon the sub-

ject, the State may require a common carrier, *although in the execution of a contract for interstate carriage,* to use great care and diligence in the carrying of passengers and the transportation of goods *and to be liable for the whole loss resulting from negligence in the discharge of its duties.*"

We also call the court's attention to the language in the James case, 162 U. S., 650, viz:

> "So long as Congress is silent upon the subject we think it within the power of the State government to enact legislation of the nature of this Georgian statute."

So this is not a case where the silence of Congress is equivalent to an express enactment. We have here a power vested in Congress to regulate commerce between the several States, which power Congress has not exercised in so far as it relates to telegraph companies; and such power not having been exercised, under the law in the Hughes case and the James case, it is within the province of the several States to make such laws and regulations providing such regulations do not interfere with the free interchanging of messages between the several States. The case therefore resolves itself to a question as to whether the construction of the statute of Michigan as construed by the Supreme Court of that State is in any wise an interference with or a burden upon interstate commerce. The learned counsel for appellant state in their brief that the only case that they have been able to find in the decisions of this court that is at all similar to the present one is the Pendleton case in the 122 U. S., 347, but after a careful reading of that case we fear that counsel have failed to grasp the entire scope of the decision. To our minds, the gist of the decision in the Pendleton case was not that the statute imposed a liability upon telegraph companies for mistakes or failure to deliver growing out of their own negligence, but that, firstly, the statute fixed an absolute penalty for such failure to deliver irrespective of what the actual damage was to the sender of the telegram; in other words, the statute was a penal statute; and, secondly, that the statute undertook to fix certain methods of delivery and to establish certain limits within which the telegraph company must deliver telegrams free of charge after arrival at destination, which provision was unquestionably placing additional burden upon interstate commerce. Furthermore, the Indiana statute referred to

in the Pendleton case was made use of as a penal statute and the action was brought to recover a penalty under it, and the decision of this court was also to the effect that the penal laws of a State do not extend beyond its own boundaries.

It seems to us, however, that the case of Pa. R. R. Co. vs. Hughes, decided by this Court in the October term of 1903 and reported in the 191 U. S., 491, is analogous to the present case. In that case suit was brought in Philadelphia by Hughes against the railroad company for injury to a horse shipped form Albany, N. Y., to Cnywyd, Pa. The railroad company defended on the ground of the special contract on the back of the bill of lading exempting it from damages. The Supreme Court of Pennsylvania held that the policy of the law of Pennsylvania as decreed by her court of last resort did not permit of such limitations. Upon appeal, this Court, after referring to and citing the case of Chicago, M. & St. P. R. Co. vs. Sloan, 169 U. S., 133, which was an appeal from an Iowa court construing the statute in that case, uses the following language which we have in part quoted before:

> "It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that state. But the principle recognized is that, in the absence of congressional legislation upon the subject, a state may require a common carrier, *although in the execution of a contract for interstate carriage,* to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.
>
> We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce, in the absence of congressional action providing a different measure of

> liability when contracts such as the one now before us are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary."

It is conceded in the opinion of Mr. Justice Carpenter of the Michigan Supreme Court in the case at bar, that had that court decided that such a limitation of the liability of a telegraph company as has been set up in defense in this action is void as against public policy, there could be no appeal to this court; but we fail to see under the language above cited, in the Hughes case, where the distinction lies between the decision of a court on the question of public policy and a statute of a state declaratory thereof.

Although this court has not directly passed upon the precise question presented in the case at bar in any suit where a telegraph company has been party to the action, yet we submit that the Hughes case above cited is upon principle on all fours with the present case and the reasoning there is most applicable for its solution. The very question, involving telegraph companies themselves, has, however, been carefully considered by the writers of some modern text-books, and the courts of last resort in several state have written exhaustive opinions thereon, some of which have already been cited in this brief under other heads. We think it not amiss for us to quote from several of these authorities as able expressions of the doctrine for which we contend. We first quote from Jones on Telegraph and Telephone Companies, section 432, as follows:

> "A great many cases have grown out of suits brought to recover damages for errors made in the transmission of messages which are sent from one State to another. A question which has presented itself in such cases is whether an action can be maintained for the breach of the company's common-law duty to use proper care to secure a correct and prompt transmission and delivery where the message falls within the case of interestate messages? This question has been answered by an almost unanimity of decisions in the affirmative. It has been held that the sender may recover damages for such breach, *although it happended in the State other than that from which the message was sent.* The receiver of the message may, as held, maintain the suit, also, with

respect to the civil action, and it does not matter where the breach occurred. The contract for sending the message was made in the State from which it was sent, and there the action should be maintained, irrespective of the place or places where the breach occurred. 'It is wholly immaterial,' as was said, 'where the act of omission occurred, whether at the office where it was received, at some intermediate point, or at the office to which it was sent. The contract cannot in such case be said to have been violated at one place any more than at another. It is violated everywhere because it is performed nowhere.' This rule would only apply where the action was to recover damages for a breach of its public duty or on an action of tort. *And it seems that the fact that a statute exists which is declaratory of the common-law duty, and which further provides that the company shall not contract to limit its liability for the consequences of its own negligence, does not create a different case or necessitate a different rule of law.*"

See also

Wharton on Conflict of Laws, 3rd Ed., Sec. 471f,

which states the law on this subject as follows:

"By analogy to the rule declared ante sec. 471b, with reference to contracts for the transportation of persons or property, the general rule seems to be that a contract made in one State or county for the transmission of a telegram from a point in that State or county to a point in another is governed by the law of the State or county in which the contract is made and from which the telegram is sent, rather than by that of the State in which it is received. *By the application of this rule it has been held that the Statute of the State from which the telegram is sent, making the telegraph companies liable for all mistakes in transmission and for all damages resulting from a failure to perform any of the duties required by law, is applicable, notwithstanding that the telegram is to be delivered in another State.*" * * *

"The penalty allowed by the law of either State, in addition to actual damages, cannot, of course, be recovered unless by an action brought in the State in which it is imposed."

See also

Joyce on Electric Law, 2nd Ed., Sec. 123.

"Again, where the State statute is intended to enforce a prompt and correct delivery of messages, and provides no penalty for its infraction, but its violation is declared a misdemeanor, and the offending company is subjected thereby to prosecution and the right of action is given to the injured person for all damages sustained by the breach of public duty, such statute is not an obstruction, but an aid, to interestate commerce, and it is immaterial that the message was sent from another State for delivery in the State wherein the statute was enacted, nor is it for that reason objectionable as an interference with interstate commerce."

In Iowa a law was passed restraining a common carrier from placing any restriction in his contract relieving it from any liability, etc. This statute was attacked on the ground that it interfered with interstate commerce, and in discussing this question in the case of Hart vs. Chicago & N. W. R. R. Co., 69 Ia., the court says:

"It is contended, however, that the State has no power to place a restriction of that character upon a carrier who contracts for the transportation of property from this State into another State or territory. The position is that a restriction, if applicable to a contract of this character, would be a regulation of commerce among the States—a subject which, under the federal constitution, is within the execlusive jurisdiction of the Congress of the United States. In our opinion, however, this position cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the

property. But no burden is placed upon the property which is the subject of the contract, and neither is any rule prescribed for his government respecting it. That it is within the power of the State to prescribe such a limitation upon his power to contract, we have no doubt. The statute was enacted by the State in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction."

The opinion of Mr. Justice Ostrander of the Supreme Court of Michigan in rendering the decision, which sustained the decision of the lower court and is, therefore, the opinion of the Supreme Court, and the opinion from which this appeal is taken holds:

> "That the proper construction of the statute and its effect is to forbid a limitation of liability for the consequences of these miscarriages for which at common law such companies are liable and to this extent to make void the stipulation contained in the contract which reads: 'It is agreed that the company shall not be liable for mistakes beyond the amount received for sending the same.'" See opinion of Mr. Justice Ostrander, Record, page 32.

This being the construction of the statute by the Supreme Court in Michigan, such construction will be accepted as final by this court, as, in the case of Mo., K. & T. R. Co. vs. McCann & Smitzer, Mr. Justice White says:

> "The elementary rule is that this court accepts the interpretation of the statute of a State as affixed to it by the court of last resort thereof,"

so that this statute as construed by the Supreme Court of Michigan (quoting again from opinion of Mr. Justice Ostrander)

> "does not attempt to state, measure or define any duty of the telegraph company, or to establish, define or fix the consequences of its miscarriage. The liability of defendant is established without reference to the statute. It is when it asks to be discharged therefrom by giving effect to the stipulation that the statute becomes effective."

The statute in no way attempts to regulate or interfere with or place any additional servitude upon interstate commerce. As was said in the case of

Western Union vs. James, 162 *U. S.*, 650.

"But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other States. It would not unfavorably affect or embarrass it in the course of its employment, and hence until Congress speaks upon the subject it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor.

The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. *The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not.* No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several States by holding that in regard to such a message as the one in question, although it comes from a place without the State, it is yet under the jurisdiction of the State where it is to be delivered (after its arrival therein at the place of delivery), at least so far as legislation of the State tends to enforce the performance of duty owed by the company under the general law. *So long as Congress is silent upon the subject, we think it is within the*

> *power of the State government to enact legislation of the nature of this Georgian statute.* It is not a case where the silence of Congress is equivalent to an express enactment. As has been said, this statute levies no tax and seeks no revenue from the company by reason of these interstate messages."

For evidence that this construction of the statute by Justice Ostrander is the proper construction, we refer the Court to the constructions of similar statutes in other States.

The statute for Wisconsin renders the telegraph company

> "liable for all damages occasioned by the failure or neglect of their operators, servants or employes in receiving, copying, transmitting or delivering dispatches or messages."

In construing this statute the Supreme Court of Wisconsin in the case of Cutts vs. Western Union Telegraph Co., 71 Wis., 46, where the defense of the written condition was interposed by defendant, says, after discussing the statute:

> "We shall not attempt an interpretation of this statute any further than to hold that it does render telegraph companies liable for the damages resulting directly from their negligence in the matter of transmitting messages, especially where, as in this case, the agent of the telegraph company is acquainted with the contents and significance of the message. It is unnecessary that we should go further in this case."

The statute of Nebraska provides, in terms, after decreeing that the telegraph company shall be liable for all neglect, etc., "any such telegraph company shall not be exempted from any such liability by reason of any clause condition or agreement contained in its printed blanks." In construing this statute in the case of the Telegraph Co. vs. Beals, 56 Neb., 415, the Supreme Court of Nebraska held that the company was liable notwithstanding the clause, condition or agreement on its printed blanks; and in that connection declared that the law of Wisconsin, hereinabove referred to (and which does not contain the clause

above quoted in reference to any printed clause, condition or agreement contained in the printed blanks), does not differ materially from the Nebraska statute. And so we contend here that it is immaterial so far as concerns the effect of our statute upon contracts made by the telegraph company, that it contains no clause providing in terms that any agreement of the telegraph company in contravention of the statute shall not be binding. The evident intent of the Legislature is there in the statute, particularly so because a careful reading of the statute will show that the Legislature, with this evident intention in mind, have used the words "repeated or unrepeated message," clearly having in mind, and in fact using the terms employed by the telegraph company in its printed agreement. See also Western Union vs. Lowrey, 49 N. W. Rep., 707.

In the United States Circuit Court of Appeals the question of the California statute which simply provides that the carrier of messages must use great care and diligence in the transmission and delivery of the same, is discussed. In the carefully considered case of the Western Union Telegraph Co. vs. Cook, reported in the 9 C. C. A., on page 680, the Court says:

> "We agree with the Supreme Court of California, in the Hart case, that 'it is enough to say that, if the stipulation is one that can be made, it is a part of the contract, and is supported by the same consideration that supports the contract for the transmission of the massage.' But, in regard to the extent that such a stipulation contravenes reason and public policy, there is, as has been said, much conflict in the decisions of the courts of the country. No decision that has come under our observation holds that the right of a telegraph company to contract for the limitation of its liability is without limit; and we are of the opinion, after mature consideration, *that it would be against reason and public policy to hold that it is permissible for such a company to stipulate for immunity from liability for a failure to exercise the care and diligence that the statute under which it operates declares it shall exercise.* That being, in the present case, 'great care and diligence,' the failure on the part of the plaintiff in error to exercise that degree of care and diligence would render it liable for the damages sustained by the

sender, notwithstanding the stipulation in question. There is certainly no hardship, but much sound reason, in requiring a telegraph company to exercise great care and diligence in the transmission and delivery of messages which it contracts to transmit and deliver, and for which it is paid."

The case of the Western Union Telegraph Co. vs. Reynolds, 77 Va., 173, was a suit for damages for the non-delivery of a telegram sent from Virginia. The statute of Virginia provides, among other things, that the telegraph company is to receive dispatches from or for any person and upon the payment of the usual charges therefor, according to the regulations of the company, to transmit the same faithfully and impartially and as promptly as practicable, and provides a penalty of $100.00 for failure to transmit a dispatch faithfully and impartially. In deciding the case where the defense was the written stipulation on the back of the telegram blanks, the Court says:

"It cannot, however, be claimed that the obligation of the telegraph company to send a message grows entirely out of the contract with the sender in Virginia; in this State the obligation rests upon them for the accurate transmission and faithful delivery of a message under the statute, as we have seen, as it does upon inn keepers, common carriers and the like, upon whom legal duties rest resulting from their occupation and profession, and who owe the duty to the public irrespective of their engagements in particular instances."

Thompson on the Law of Electricity, Sec. 192, says:

"Statutory penalties imposed upon telegraph companies for non-feasance or mis-feasance in the discharge of their public duties are founded on views of public policy; and the purpose of the Legislature in enacting them would be entirely defeated if telegraph companies could impose a stipulation upon the sender of a message not to exact a penalty. Accordingly, where the statute imposes a penalty upon telegraph companies of $100.00 for failure to transmit a dispatch delivered to it with the payment or tender of the usual charge, the stipulation on the blank furnished by the company and used by the sender of the message limiting his recovery in the case of an unrepeated message to

> the amount paid for transmission, is no defense, and in an action to recover the penalty, the company cannot thus change the degree or measure of its statutory liability by the adoption of rules and regulations. Neither can such a company by such a stipulation, evade the penalty of $100.00 imposed by the statute of the same state for failure to transmit an unrepeated message correctly."

So that while the statute in this case does not in terms prohibit the making of contracts by the telegraph company, limiting their liability, yet such contract, if made, would nullify the statute. Either the statute or the contract must fail, and in this case we submit that we have shown that it is the printed agreement and not the statute which must fail, for, as shown above, the Supreme Court of Nebraska has held that there is no material difference between a statute containing the prohibitory clause and one simply making the telegraph company liable for damages.

We submit upon the authority and reasoning of the cases cited that the statute in question is not in conflict with the clause of the Constitution of the United States relating to interstate commerce. It does not interfere with or obstruct such commerce, nor regulate the manner in which it shall be conducted, nor fix the rates of service, nor levy any tax upon it, nor does it even impose a penality. It merely recognizes that the common law liability exists, and by implication, or in effect, prohibits the nullification of this liability by contract. As we have seen, it only declares the law of Michigan to be the same as the common law of the other States as laid down by their respective courts.

We shall now proceed to consider the cases cited by counsel for appellant in their brief, but before doing so we beg leave once more to call attention to the fact that the action in this case is for failure to deliver a telegram, not for a mistake in transmission, and that there is a vital difference, we again refer to the case of Thompson vs. Telegraph Co., 107 N. C., 449, hereinbefore cited, and now refer upon this point also to the case of the U. S. Telegraph Co. vs. Wenger, 55 Pa. St., 262. In the latter case a telegram was sent from Pennsylvania to New York and was never delivered and, although the Supreme Court of Pennsylvania had held in the Passmore case that a telegraph company was not liable for mistakes in trans-

mission beyond the costs of transmission (which case was cited by this Court in the decision of the Primrose case), yet the Supreme Court of Pennsylvania, in deciding the Wenger case, say, at page 263:

> "No such reason as the law would recognize, indeed no reason at all, was given for the failure to transmit the message to its destination."
>
> "There was then presented a clear case of gross negligence against the company in performing its undertaking and the consequent liability of plaintiff for such damages as should be sustained in consequence thereof."

This distinction was also pointed out by the Michigan Supreme Court in the Birkett case, and is an important distinction which is to be borne in mind when considering the cases cited in the brief for plaintiff in error.

The case of Primrose vs. Western Union Telegraph Co., 154 U. S., 1, is decided very largely upon the question of cipher dispatch and a mistake in transmission, and does not in anywise raise the question as to what the law would be on the *non-delivery* of a message. The decision in this case was not unanimous, Mr. Chief Justice Fuller and Mr. Justice Harlan dissenting and Mr. Justice White taking no part therein.

Many of the cases cited by this Court in the Primrose case have been referred to in this brief in the discussion of the cases cited in the Birkett case, decided by the Michigan Supreme Court, and we beg leave again to call the Court's attention to the fact that the Passmore case, which was cited at length in the decision of the Primrose case, was for a mistake in transmission, and that the Supreme Court of Pennsylvania draws a distinction between negligence and gross negligense, and held in the Wenger case, 55 Pa. St., 262, that failure to deliver a telegram was a case of gross negligence, and that the stipulation on the back of the telegraph blank was not a defense.

The case of Birkett vs. Western Union Tel. Co., 103 Mich., 361, has already been considered at some length and needs no further discussion at the present time.

The case of Western Union Tel. Co. vs. Pendleton, 122 U. S., 347, to which the counsel for appellant has devoted considerable attention, was decided upon the ground that

the State of Indiana had attempted to direct the manner and order of the delivery of telegrams, as well as to punish as an offense, a disregard of this rule, and Mr. Justice Field says:

> "Her attempt, *by penal statutes,* to enforce the delivery of such messages in other States in conformity with this rule can hardly fail to lead to collision with other statutes."

The Indiana statute also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telgraph station or within the city or town in which such station is. In speaking of this provision the Court says:

> "Other States might conclude that the delivery by messenger to a person living in the town or city being many miles in extent was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey."

This Court therefore held the statute unconstitutional.

In the case of the Telegraph Co. vs. Texas, 105 U. S., 460, an attempt was made to enforce the statute of Texas levying a tax upon all messages sent by the Telegraph Company. This the Court considered a tax upon interstate commerce and held the statute void.

In the case of the Pensacola Telegraph Co. against the Western Union Telegraph Co., 96 U. S. 1, a bill was filed by the Pensacola Company against the Western Union to enjoin the Western Union from erecting a telegraph line within and beyond the border of the State on the ground that the plaintiff had an exclusive charter giving it the exclusive right to operate a line within the State, and the Court naturally held that such an exclusive grant was an interference with interstate commerce rights.

The case of Western Union vs. Chiles, 214 U. S., 274, is a case of a statute fixing a certain penalty which was sought to be enforced for the failure properly to deliver a telegram sent to Fortress Monroe. This Court held that it was a penal statute and that the laws of the State had no control over property particularly and peculiarly reserved for the United States.

That there is a difference between a statute authorizing the recovery of actual damages and one fixing an arbitrary penal sum as a penalty for failure to deliver a telegram, we refer the Court to the case of Taylor-Farr Co. vs. Western Union Co., 95 Ia., 740, which was an action brought in Iowa for failure to deliver a telegram in South Dakota. The law of South Dakota provided for actual damages and $50.00 in addition thereto. At the trial of the case the Iowa court followed the Dakota statute as far as allowing actual damages, but remitted the $50.00 penalty, holding that that part of the law, being penal, was strictly local in its application.

See also Wharton on Conflict of Laws, sec. 471, as quoted above.

The case of Walling vs. Michigan, 116 U. S., 455, was an attempt made by the State of Michigan to tax travelers from business houses outside of Michigan, and was held as an interference with interstate commerce on the ground that it attempted to discriminate between residents and non-residents and in that it also imposed a tax.

The case of Welton vs. Missouri, 91 U. S., 275, was another case upon the question of the payment of a license tax, and discriminatory State legislation, which law was declared unconstitutional for these reasons.

The case of County of Mobile vs. Kimball, 102 U. S., 691, was a river and harbor bill, and is not in any way analogous to the present case.

The case of Brown vs. Houston, 114 U. S., 622, was another tax license case and was decided on this ground.

The case of Wabash R. R. Co. vs. Ill., 118 U. S., 577, was an attempt on the part of the State of Illinois to regulate tariff charges on interstate commerce, and was naturally held unconstitutional.

For the definition of a penal statute we refer to the construction placed by this court upon the Indiana statute in the Pendleton case, wherein that statute is distinctly declared to be a penal statute; but we do not think there can be a serious contention that the Michigan statute is in any sense a penal statute.

The James case we have already sufficiently covered.

In the case of Pa. R. R. vs. Hughes, this court, after deciding that there was nothing in the interstate commerce law sanctioning agreements limiting liability of

carriers to stipulated valuations, and that a statute or decision of the State Court declaring that such contract limiting liability was invalid was not an interference with interstate commerce, proceeded to state:

> "But the principle recognized is that, in the absence of congressional legislation upon the subject, a State may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties."

While it may be the law of Michigan that express companies may contract to limit their liability, they cannot contract to limit their liability for damages arising from their own negligence; and for authority on this point we refer this court to the case of Smith vs. Am. Express Co., 108 Mich., 572, cited by counsel for appellant in their brief.

We submit, therefore, that none of the cases cited by counsel for appellant in their brief are applicable to the present case in support of their contention; and the mere fact that the Justice who writes the opinion in a case used certain language unnecessary to its decision, which might imply that the decision would have been different had the message or subject matter been destined to another State, is not binding upon this court as determining the law of that case. See statement of court in the case of County of Mobile vs. Kimball, 102 U. S., 691.

In the case of Chicago, etc., vs. Sloan, 169 U. S., 133, this court expressly declines to pass upon the question as to what their decision would be if the accident had happened outside of Iowa, but hold as far as that case is concerned, that the statute is not an interference with interstate commerce.

And this court in referring to this case in the case of Pa. R. R. Co. vs. Hughes, 191 U. S., 479, says:

> "It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that State. But the principle is recognized that in the absence of congressional legislation upon the subject, the State may require a common carrier, although in the execution of a

> contract for interstate carriage, to use great care and diligence in the carrying of passengers and the transportation of goods and to be liable for the whole loss resulting from negligence in the discharge of its duties."

There are many cases decided by this court, however, which hold by implication that a statute providing that a common carrier is liable for damages to goods happening on his own line, will be sustained no matter where that line may be. This question has arisen in the line of cases where an attempt has been made to render an initial carrier liable for damages happening to goods beyond its own line (See Richmond vs. Tobacco Co., 169 U. S., 311).

If, as we contend, the state of Michigan attaches to the contract, and is merely a rule designating how the contract between the sender of the telegram and the telegraph company shall be made not how it shall be performed, then it does not in any way attach to what becomes a subject of interstate commerce, that is to say, the statute attaches before the subject of interstate commerce comes into existence. See the case of Turner vs. Md., 107 U. S., 38.

If the Supreme Court of Michigan in its wisdom had seen fit to decide that the advances made in the art of telegraphy and that the discoveries in the realm of electricity had rendered the early safeguards given by the former courts of this state inapplicable to the conditions as they exist at the present time and had held that it was against public policy; i. e., that it was against the principles of common law to allow a telegraph company to contract against its own negligence, and had not based its decisions upon the statute in question, then there would have been no right of appeal to this court and we fail to see how the distinction between an assertion of the operation of the common law, and an assertion of the operation of the statute can afford to the defendant in this suit an appeal to this court."

See also Pa. R. R. vs. Hughes, 191 U. S., 479, in which this court says:

> "We can see no difference in the application of the principal based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts."

Counsel for plaintiff in error has referred to the registered mail service as being analogous to the telegraph service. In this we are constrained to say they are mistaken. A communication enclosed in a letter gives no notice to the postal authorities or to any person handling the same of its importance. It is sealed by the sender and is not supposed to be opened until received by the addressee. Furthermore, the postal service is a government service and the government is not liable to be sued in the same manner as a telegraph company. On the other hand, the telegraph company when it receives a message is informed of the entire text of the same and must know of its importance, especially when, as in the present case, the message is written out in plain English and handed in to a branch office which the telegraph company, defendant herein, maintains in the Board of Trade. The very location of its branch office charges it with knowledge that messages sent from such office are of the utmost importance and involve transactions of a large magnitude.

We think that in the beginning of our brief we spent sufficient time upon the reasonableness of the stipulation printed upon the reverse side of the telegraph blank which the telegraph company attempts to foist upon its patrons.

THE STATUTE DOES NOT VIOLATE THE CLAUSE OF THE CONSTITUTION PROHIBITING THE STATES FROM PASSING ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS.

The question relates to the provision upon the back of the telegraph blank which the company seeks to attach to its contract for the transmission of the message. As we have seen the rule throughout the States with the exception of Michigan, in the absence of a statute, is that such a limitation of liability is contrary to public policy and void. But a contract which is contrary to public policy, we submit, is not within the scope of the constitutional provision referred to. That provision is not to be construed as impairing any of the rules or principles of the common law, or as giving favor and validity to a contract which at common law is void. While the decisions of Michigan do not hold the limitation referred to as void, yet, we submit, the following considerations are material upon this point: First, the Michigan decisions do not relate to the failure to deliver a message, but to

errors in the transmission of it. Second, they are based upon the absence of a statute regulating the subject. Such limitations upon liability are recognized as so far obnoxious to public policy as to be a proper subject of legislation. Third, the statute relates to the future. It does not in effect nullify any existing contract, but is prohibitive; and upon this point the question becomes one, not of the impairment of contracts, but the abridgment of the right of contract, and in this view falls properly under the next head of this brief. Fourth, if this Court should itself hold such a limitation upon liability to be contrary to public policy, it will not invoke the constitutional provision for the purpose of giving the limitation validity, notwithstanding the early decisions of Michigan, and particularly where the Legislature of that State has sought to reverse the rule as determined by the Court, and to conform the law of the State to the common law rule, as recognized in the other States.

STATUTE NOT IN VIOLATION OF FOURTEENTH AMENDMENT.

The answer to the proposition advanced by counsel for appellant that the statute, if otherwise valid and if prohibitive, violates the fourteenth amendment of the Federal Constitution, seems to be found in the language of the United States Supreme Court in the James case above referred to and hereinbefore quoted. The statute in question in the case at bar merely prohibits the making of a kind of contract which nearly all of the States of the Union have held to be void as against public policy, irrespective of statutory enactments. The United States Court of Appeals in the Cook case hereinbefore cited and reported in the 9 C. C. A., 680, has held that such a contract is void under the provisions of a statute which provides that telegraph companies "must use great care and diligence in the transmission and delivery of messages."

The case cited by counsel for appellant in their brief upon this point, viz.: the Lochner case, was an appeal from a conviction under a penal statute providing "that no employe shall be required or permitted to work more than ten hours a day," with no provision for special emergencies; and the court held that this was equivalent to the provision that "no employe shall contract or agree to work," etc., and this was held by a majority of the court, Justices Harlan, White, Day and Holmes dissent-

ing, to be a restraint upon the power of an individual to contract for his labor and that the right to purchase or sell labor is a part of the liberty protected by the fourteenth amendment. In order to bring the case at bar under the provisions of the Lochner case, it must be found that the right of a telegraph company to be negligent in the transmission or delivery of messages is a part of the liberty guaranteed by the Constitution of the United States; and this, we submit, is arrant nonsense, for the holding in that case cannot in any way be construed to support the position of appellant. It merely supports the right of contract; but the subject concerning which the contract is made must be such a subject in itself as is protected under the Constitution of the United States.

In the case of the Knoxville Iron Co. vs. Harbison, 183 U. S., 13, it was distinctly held that the right of contract is not absolute but may be subject to restraints demanded by the safety and welfare of the state. In the case of McCulloch vs. Maryland, 4th Wheat., 316, it was held that *if there is any doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.*

THE STATUTE DOES NOT DENY TO PLAINTIFF IN ERROR OR TO PERSONS WITH WHOM IT DOES BUSINESS, THE EQUAL PROTECTION OF THE LAWS.

The statute under discussion regulating telegraph companies makes them liable only for mistakes, errors or delays in transmission or delivery, or for non-delivery of any repeated or unrepeated message in damages to the amount which the person or persons interested may have sustained by reason of mistakes, errors or delays in the transmission or delivery *due to negligence of said company,* or for the non-delivery of any such dispatch *due to the negligence of such telegraph company or its agents,* so that by the terms of the statute the only liabilities placed upon a telegraph company are those for damages accruing from the negligence of the company or its agents; and this is the law of Michigan in regard to common carriers, as held in the case of Smith vs. American Express Co., 108 Mich., 572, cited by plaintiff in error. In that case the Supreme Court laid down

the law particularly that the bill of lading which contained certain restrictions upon the reverse side thereof was not to be construed as limiting the defendant's liability in any way for loss or damage due to the negligence or default of its employes, and the entire case was decided upon the point that no negligence of defendant was shown.

In this connection it may not be amiss to observe that in the case of a telegraph company's failure to deliver a message the burden is not upon the sender of the message to show negligence but upon the company to show want of negligence. See Sutherland on Damages, Third Edition, Section 957, in which the doctrine is laid down as follows:

> "The omission to send a message or to deliver one which has been transmitted or the occurrence of an error in its tenor is prima facie evidence of neglect upon the part of the company and the burden of proof is upon them to show that said failure or mistake happened without their fault, as the means of doing so are peculiarly within their power" (citing some twenty cases).

Again in the case of the U. S. Telegraph Co. vs. Wenger, 55 Pa. St., 262, the court says, in speaking of proof of negligence in the company's failure to deliver a telegram:

> "No such reason as the law would recognize, indeed, no reason at all was given for the failure to transmit a message to its destination. Thus there was presented a clear case of gross negligence against the company in performing its undertaking and the consequent liability to plaintiff for such damage is to be sustained in consequence thereof."

TO RECAPITULATE.

We have:

First—An action brought to recover damages for failure to deliver a telegram and not for a mistake or error in transmission.

Second—A Michigan contract entered into in Michigan, the consideration of which was paid in Michigan

and the fulfillment of the contract on the part of the telegraph company was begun in Michigan, and such contract was made and entered into in the light of a Michigan statute.

Third—A Michigan statute which is not a penal statute, and in this respect differs from the statutes discussed in the cases cited by plaintiff in error; for in each of such cases the statute in question was a penal statute.

Fourth—A construction of the statute by the Supreme Court of Michigan, which construes it as a prohibition of the right of a telegraph company to limit its liability for the consequences of those miscarriages for which, at common law, such company was liable, and not as an attempt to state, measure or define any duty of the telegraph company, and which construction will be adopted by this court (See Mo. K. T. R. Co. vs. McCann & Smizer, 174 U. S., 583).

If this court should find that the construction as set forth in the opinion of Mr. Justice Ostrander is not the construction of the court, then, we submit, it remains for this court to construe said statute in such a manner as to give it validity under the doctrine in the case of McCulloch vs. Maryland, 4 Wheat., 316, above cited.

If this court should find that the statute as passed is unconstitutional, then this court, we submit, must determine whether the attempted limitation of the liability of the telegraph company by the written stipulation on the back of its blank is or is not void as against public policy; and it would seem that there is no decision in any state in the union or in this court which holds that where a message has been committed to the care of the telegraph company, and such message has not been delivered, such stipulation upon the back of the blank exempts the company from liability. On the contrary, every state in the union excepting Michigan and Massachusetts, have held in the absence of statute that the stipulation upon the back of the telegraph blanks is void as against public policy in the case of a message committed to the care of the telegraph company and not delivered, and Massachusetts and Michigan have been silent upon that question. This doctrine, as has been shown in the forepart of this brief, has received the unanimous assent of all of the modern text book writers upon that subject.

In addition to the cases cited in the beginning of our brief on this subject we wish to call the court's attention to the following:

Wharton on Negligence, Sec. 762:

> "Company cannot by stipulation relieve itself from consequences of negligence." * * *
>
> "This principle, which has been fully discussed in its relation to carriers, applies with equal force to telegraphic companies."

Jones on Telegraph and Telephone Companies, Sec. 367:

"Negligence—Cannot Contract Against—in Most Cases.

> "The general rule supported by the weight of authority is, that telegraph companies cannot by any kind of a contract exempt themselves from losses caused by their own negligence or that of their servants."
>
> "The rule rests upon the consideration of public policy and upon the fact that to allow the companies to absolve themselves from the duty of exercising care and fidelity would be inconsistent with the very nature of their undertaking. It is the duty of every citizen, while following his daily avocation, to exercise due care and fidelity toward his fellow-man; and for any negligence to do so, whereby the latter suffers loss, the former will be liable. These companies have assumed public functions, and the care and fidelity which they owe the public is even greater than those of private citizns. In other words, these parties do not stand on equal footing with telegraph companies, but the latter has acquired, in consideration of public duties assumed, certain privileges and exemptions, under the articles of incorporation, which are not enjoyed by the public in general; therefore, to permit them to exempt themselves from liability caused by their own negligence would, in effect, authorize them to abandon the most essential duties of their employment." * * *

Sec. 376, same continued—validity of such stipulation.

> "The validity of the stipulation in the blank form by which these companies have attempted to exonerate themselves for all losses caused by errors made in the transmission or delays in delivering messages, except the amount received for sending,

unless the message is ordered to be repeated, has been variously viewed by the courts; yet the weight of authority is that they are void and unenforceable." * * *

68 *Ga.*, 299, *Western Union Telegraph Co. vs. Blanchard, Williams & Co.*

"It is insisted, however, by way of defense, that as the plaintiffs made no request or payment to have the message sent 'repeated,' and as under the evidence and rules of the company absolute accuracy in the transmission of messages can only be secured by 'repeating' them, the plaintiffs were notified by the printed rules of this necessity, and hence defendants are not liable, since they did not repeat the message. We can only say that any rule or regulation of the company which seeks to relieve it from performing its duty belonging to the employment with integrity, skill and diligence, contravenes public policy as well as the law, and under it the party at fault cannot seek refuge. If it becomes necessary for the company, in transmitting messages with integrity, skill and diligence, to secure accuracy, to have said messages repeated, then the law devolves upon them that duty to meet its requirements. We know of no law in this State that limits their tolls or messages; this is under their own control. The message must be transmitted with integrity, skill and diligence and the mode of attaining accuracy in such work they have at their own command—the compensation paid therefor the law does not seek to limit or restrict."

See also on this subject:

W. U. Tel. Co. vs. Chamblee, 122 *Alabama*, 428.
W. U. Tel. Co. vs. Short, 53 *Ark.*, 434.
W. U. Tel. Co. vs. Meek, 49 *Ind.*, 53.
Ayer vs. W. U. Tel. Co., 79 *Me.*, 493.
Wertz vs. W. U. Tel. Co., 7 *Utah*, 446.
Southern Express Co. vs. Colwell, 88 *U. S.*, 264.
Francis vs. W. U. Tel. Co., 58 *Minn.*, 252.

So we submit that if this court should find that the construction of the statute by Mr. Justice Ostrander is the construction placed thereon by the Supreme Court of Michigan, it is bound thereby and such statute does not in any way interfere with or impede commerce between

the several states, and if said construction is not the construction of the statute, then this court should find that irrespective of the statute, such limitation of the telegraph companies' liability is void as against public policy.

In the preparation of this brief, we have gone fully into the different subjects discussed, even at the risk of tiring the patince of an overburdened court, but we feel that while the amount involved in this particular case is not sufficient to possibly call for so lengthy discussion, yet the decision of this case will involve the constitutionality of a law of Michigan, which, if found valid, will materially change the relation of the patron of the telegraph company and for this reason we beg the indulgence of the court in a careful reading of the foregoing.

Respectfully submitted,

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